***United States Court of Appeals***

***for the Second Circuit***

# APPENDIX

# 74-1905

## United States Court of Appeals

**For the Second Circuit.**

UNITED STATES OF AMERICA,

*Appellee,*

*v.*

ROBERT BOLLELLA,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of New York.

APPENDIX

IRWIN KLEIN, P.C.,
Attorney for Defendant-Appellant,
ROBERT BOLLELLA,
Two Park Avenue
New York, N.Y. 10016
MU 3-0054.

DAVID TRAGER,
United States Attorney,
Attorney for Appellee,
U.S. Court House,
225 Cadman Plaza East
Brooklyn, N.Y.
596-5700.

UNITED STATES COURT OF APPEALS
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## INDEX TO APPENDIX


| | Page |
|---|---|
| Docket Entries | 1a |
| Indictment | 10a |
| Prosecutor's Opening Statement | 70a |
| Excerpts From Transcript | 14a |
| Berry - direct | 14a, 277a |
| cross | 36a, 281a |
| Condon - direct | 75a |
| cross | 122a |
| redirect | 124a |
| Denisch - direct | 146a |
| cross | 148a |
| redirect | 151a |
| re-cross | 153a |
| Bollella - direct | 159a |
| cross | 190a |
| Rooney - direct | 243a |
| cross | 248a |
| Exhibits: | |
| Detective Rosa's Report "CC" | 380a |
| Request to Charge - Subsequent Crime | 381a |
| Request to Charge - Massiah | 382a |
| Motion to Set Aside Verdict | 291a |
| Denial of Motion to Set Aside Verdict | 350a |
| Judgment of Conviction | 383a |
| Notice of Appeal | 384a |

# United States Court of Appeals

FOR THE SECOND CIRCUIT.

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THE UNITED STATES,

*Plaintiff-Appellee,*

*against*

SALVATORE MONTELLO, JOHN FRANCIS RIPOLL, JAMES VINCENT SANTA MARIA, RONALD JAMES DECONZA, and ANTHONY FASANELLA,

*Defendants-Appellants.*

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**Docket Entries.**

| Date | Proceedings |
|---|---|
| 8/10/72 | Before Mishler, Ch. J.—Superseding indictment filed. |
| 8/22/72 | Before Bartels J—Case called—all defts present except deft Dennis Condon—deft arraigned and all enter pleas of not guilty. deft O.R. Court appoints Legal Aid to represent deft Condon. |
| 8/22/72 | Notice of Appearance filed (defts. Louis and Salvatore Montello, Santamaria & Ripoll) |
| 1/29/72 | Notice of Appearance by Counsel Jerome Lewis for deft Anthony Fasinella. |
| 1/29/72 | Before Heaher, J.—Case called-Pre-Trial conference held and concluded-Set for Trial 2/19/73. |
| 2/ 8/72 | Before Neaher, j.—Case called-Marked off. |
| 1/29/73 | Petition for Writ of Habeas Corpus *Ad Prosequendum* filed. |
| 1/29/73 | By Weinstein, J.—Writ issued. |

*Docket Entries*

| | |
|---|---|
| 2/22/73 | Before Neaher, J—Case called—to set a date for Trial—Trial date set for July 2, 1973. |
| 2/22 73 | Notice of Appearance filed. (DeConza) |
| 3/29/73 | Letter of Mar. 27, 1973 filed received from Chambers of Judge Neaher—matter for Trial on July 2, 1973 sent by Michael F. Coiro, Jr. Esq. |
| 5/23/73 | Affidavit of Lawrence Hochheiser filed (received from Chambers) *re* deft John Ripol. |
| 6/20/73 | By Neaher, J. Memorandum Order filed, that the trial case will commence on July 2, 1973 and that all motions must be filed prior to 6/25/73 |
| 6/21/73 | Before Neaher, J.—Case called—Deft Louis Montello present-Deft Montello motion to adj. trial date Motion denied. |
| 6/25/73 | Affidavit and Motion, to Suppress filed (Anthony Fasanella), ret. 7/2/73 |
| 6/25/73 | Motion for Discovery and Inspection filed., ret. 7/2/73 (No deft indicated) |
| 6/25/73 | Notice of Motion filed as to deft Louis Montello for continuance etc. |
| 6/26/73 | Notice of Appearance filed for deft Montello. |
| 6/26/73 | Before Neaher, J—Case called—Defts motion for continuance (Montello) Hearing ordered and Begun—Deft present with counsel Salvatore Quagliata—Hearing concluded—Decision Reserved. |
| 6/28/73 | By Neaher, J—Memorandum and Order filed denying defts motion for continuance etc. Trial must proceed on its scheduled date. Trial scheduled for July 2, 1973. (Montello) |
| 7/ 2/73 | Before Neaher, J.—Case called—Motion for discovery and inspection, etc. argued and granted as indicated. (Bollella) Motion to suppress argued, and granted indicated. (Fasanella) |

*Docket Entries*

| | |
|---|---|
| 7/ 2/73 | Notice of Appearance filed. |
| 7/ 2/73 | Before Neaher, J.—Case called—Trial ordered and begun—Deft D. Condon arraigned and withdraws his plea of not guilty and enter a plea of guilty to ct. 1—Sentence adjd without date Deft cont'd in custody Hearing of motion to suppress ordered and begun—Trial cont'd to 7/5/73. |
| 7/ 5/73 | Before Neaher, J.—Case called—Trial resumed —Trial adjd to 7/9/73. |
| 7/ 9/73 | Before Neaher, J.—Case called—Trial resumed —Jurors selected and sworn—Trial held and cont'd to 7/10/73. |
| 7/10/73 | Before Neaher, J.—Case called—Trial resumed —Deft Ballello's motion for mistrial Motion denied—Trial held and cont'd to 7/11/73. |
| 7/11/73 | Before Neaher, J.—Case called—Trial resumed —Deft S. Montello's motion to sever—Denied —Motion for a mistrial—denied—Deft Louis Montello's motion for a severance—Motion granted as indicated—Deft Fasanella's motion for mistrial—Motion denied—Trial held and cont'd to 7/12/73. |
| 7/12/73 | Before Neaher, J.—Case called—Trial resumed —Deft S. Montello's motion to dismiss—Motion denied—Trial held and cont'd to 7/16/73. |
| 7/16/73 | Before Neaher, J.—Case called—Trial resumed —Trial cont'd to 7/17/73. |
| 7/17/73 | Before Neaher, J—Case called—Trial resumed —Trial contd to July 18, 1973. |
| 7/18/73 | Before Neaher, J.—Case called—Trial resumed Trial cont'd to 7/19/73. |
| 7/19/73 | Before Neaher, J.—Case called—Trial resumed Deft Santa Maria's motion to dismiss—Denied—Trial held and cont'd to 7/23/73. |

*Docket Entries*

| | |
|---|---|
| 7/23/73 | Before Neaher, J.—Case called—Trial resumed. Trial held and continued to 7/24/73 |
| 7/24/73 | Before Neaher, J—Case called—Trial resumed Trial contd to July 25, 1973. |
| 7/25/73 | Before Neaher, J.—Case called—Trial resumed —Trial cont'd and held to 7/26/73. |
| 7/27/73 | Before Neaher, J.—Case called—Trial resumed —Deft's motion for a mistrial—Motion denied —Trial cont'd to 7/30/73. |
| 7/30/73 | Before, Neaher, J.—Case called—Defts present with their counsel—Trial resumed—Trial contd to 7/31/73 |
| 7/31/73 | Before, Neaher, J.—Case called—Trial resumed —Trial contd to 8/1/73 |
| 8/ 1/73 | Before, Neaher, J.—Case called—Trial resumed —Trial contd to 8/2/73 |
| 8/ 2/73 | Before Neaher, J—Case called—Trial resumed —Trial contd to August 3, 1973. |
| 8/ 3/73 | Before Neaher, J—Case called—Trial resumed—court charges Jury—Alternates discharged—Marshal sworn—Jury retires to deliberate and returns at 7:30 PM with a verdict as follows: Trial concluded 2 Orders of Sustenance signed. Defts Montello, Ripoll, Santa Maria, DeConza, Fasanella guilty as to counts 1, 2 & 3; deft Bolella guilty on counts 2, 3 & 4 and not guilty on count 1—sentences adjd without date as to all defts. |
| 8/ 7/73 | Stenographer's transcripts of July 2, 5, 19, 11, 16, 17, 18, 9, 23, 24, 25, 30 and 31, 1973 filed. |
| 9/ 5/73 | Voucher for expert services filed (Ripoll) |
| 9/14/73 | Govt's pre-trial Memorandum filed. |

*Docket Entries*

| | |
|---|---|
| 9/21/73 | Before Neaher, J.—Case called—Defts present with counsel—Defts Santa Maria, Ripoll and DeConza's motion to set aside verdict denied—Defts sentenced to imprisonment for a period of 5 years on each of counts 1, 2 and 3 to run concurrently, pursuant to T-18, U.S.C. Sec. 4208(a)(2) Bail contd pending appeal as to all three defts—Deft Montello sentenced to imprisonment for a period of 7½ years on count 2 to run concurrently with count 3 and 5 years on count 1 to run concurrently with counts 2 and 3 pursuant to T-18—4208(a) Bail contd pending appeal—Deft Condon's imposition of sentence is suspended on count 1 and the deft is placed on probation for a period of 5 years—On the motion of A.U.S.A. Ryan counts 2 and 3 are dismissed—Case adjd to 9/25/73 as to deft Fasanella |
| 9/21/73 | Judgment and Commitment filed—certified copies to Marshal (Montello, Ripoll, Santa Maria, DeConza) |
| 9/21/73 | Judgment and Order of Probation filed—certified copies to Probation (Condon) |
| 9/25/73 | Before Neaher, J—Case called—deft Fasanella & counsel Jerome Lewis present; deft is sentenced to imprisonment for a term of 5 years on each of counts 1, 2 & 3 to run concurrently pursuant to 18:4208(a)(2). Bail continued pending appeal. |
| 9/25/73 | Judgment and Commitment filed—certified copies to Marshal (Fasanella) |
| 9/25/73 | Notice of Appeal filed (Fasanella) |
| 9/25/73 | Docket entries and duplicate of Notice mailed to C of A (Fasanella) |

*Docket Entries*

| | |
|---|---|
| 9/26/73 | Notice of appeal filed (DeConza, Santa Maria, Montello) |
| 9/26/73 | Docket entries and duplicate of notice of appeal mailed to court of Appeals (DeConza, Santa Maria, Montello) |
| 10/ 1/73 | Before Neaher, J—Case called—deft & counsel I. Klein present (Robert George Bollella) defts motion to set aside the verdict—Decision Reserved—adjd to Oct. 15, 1973 at 4:00 PM |
| 10/ 2/73 | Stenographers Transcript dated 9/21/73 filed |
| 10/10/73 | Notice of Appeal filed (Ripoll) |
| 10/10/73 | Docket entries and duplicate of notice of appeal sent to Court of Appeals |
| 10/15/73 | Before Neaher, J -Case called and adjd to 10/18/73 at 4:00 P. M. (Bollella) |
| 10/16/73 | Govts Memorandum of Law filed (Bollella) |
| 10/18/73 | Magistrate's files 73 M 1435, 1436, 1437, 1438 and 1441 inserted into CR file |
| 10/18/73 | Index to Record on Appeal certified and mailed to Court of Appeals (S. Montello, Fasinella, Santa Maria, De Conza and Ripoll) |
| 10/18/73 | Before Neaher, J. -Case called for sentence as to deft Bollella-hearing on a motion to set aside verdict-motion argued-decision reserved-Grand Jury Minutes marked as Govt Ex 1-2 in evidence |
| 10/19/73 | Certified copy of Order recd and filed from the Court of Appeals that the record be docketed on or before Oct. 30, 1973 |
| 10/23/73 | Acknowledgment received from Court of Appeals and filed for index to record on Appeal (S. Montello, Ripoll, Santa Maria, De Conza and Fasanella) |
| 10/1/73 | Stenographers transcript dated Oct. 1, 1973 filed (Bollella) |
| 10/26/73 | Stenographers Transcript dated 8/3/73 filed |

Docket Entries

| | |
|---|---|
| 11/5/73 | Affidavit of Lawrence Hochheiser filed., and Confidential Report (forwarded to Judge Neaher) |
| 11/20/73 | Stenographers Transcript dated 10/18/73 filed |
| 1/22/74 | (2) Govts Memorandums of Law filed |
| 1/22/74 | Govts Request to Charge filed |
| 1/22/74 | Supplemental Request to Charge filed |
| 1/22/74 | Supplemental Index to Record on Appeal certified and mailed to the Court of Appeals |
| 1/30/74 | Acknowledgement received from the Court of Appeals and filed for receipt of supplemental Index to Record on Appeal |
| 2/1/74 | Record on Appeal received from Court of Appeals-Acknowledgement mailed for receipt of filed |
| 2/1/74 | By Neaher, J-Memorandum filed on applications for payments under the Criminal Justice Act (deft Ripoll-Lawrence Hochhesier) forwarded to Chief Judge Irving Kaufman for approval as directed in Memo signed by Judge Neaher. |
| 2/11/74 | Before Neaher, J. -Case called-No opposition and deft Salvatore Montello's motion for stay of surrender granted-Date of surrender to 4-10-74 (Salvatore Montello) |
| 2/13/74 | Stenographers Transcript dated 2/11/74 filed |
| 3/4/74 | Judgment received from the Court of Appeals filed affirming the Judgment of this court (JN) |
| 3/8/74 | Before Neaher, J. -Case called- Defts application for stay of execution of surrender and to continue-Stay granted to 3-22-74 |
| 3/11/74 | Copy of Letter to William Sonenshine, Esq. from Supreme Court filed re: petition for writ of certiorari |
| 3/22/74 | Before Neaher, J -Case called- defts oral motion for stay of surrender to 4-1-74-granted (Montello et al) |
| 4/2/74 | Certified copies of Judgment & Commitments retd and filed-defts delivered to Federal Detention Headquarters (Santa Maria, De Conza, Fasanella & Ripoll) |
| 4/10/74 | Copy of Judgment and Commitment retd and filed - deft Montello del. to Federal Detention Headquarters |

Docket Entries

| | |
|---|---|
| 5/6/74 | Voucher for compensation of counsel filed (Ripoll) Lawrence Hochheiser, Esq. |
| 5/6/74 | Voucher for Expert Services filed (Ripoll) Herman H. Race, Investigations) |
| 5/21/74 | Certified copy of Judgment received from the Court of Appeals denying writ of certiorari |
| 5/28/74 | Stenographers Transcript filed dated August 22, 1972 |
| 6/4/74 | Notice of Motion filed pursuant to Rule 35 for reducing sentence imposed (deft Fasanella) forwarded to Neaher, J. |
| 6/5/74 | Affidavit of Joseph Ryan Jr filed in connection to motion of deft Fasanella for reduction of sentence imposed forwarded to Neaher, J. |
| 6/7/74 | By Neaher, J-Memorandum and Order filed denying defts motion to set aside the Jury verdict (Bollella) |
| 6/7/74 | Motion to Set Aside Jury Verdict; Govts Memorandum of Law; Supplemental Reply Memorandum; Supplemental Memorandum (2) of deft Bollella all filed received from Chambers |
| 6/17/74 | By Neaher, J - Memorandum Order filed denying motion of deft Fasanella for reduction of sentence imposed. |
| 6/21/74 | Notice of Motion filed as to deft Montella, Salvatore, for reducing or modifying sentence heretofore imposed on the deft (ret. June 28, 1974) |
| 6/28/74 | Before Neaher, J. -Deft S. Montello's motion for reduction of sentence adjd to 8-9-74 at 10:00 A. M. |
| 6/28/74 | Before Neaher, J. -Case called-Deft Robert Bollella and counsel Irwin Klein, present-Deft sentenced to imprisonment for a period of 3 yearson count pursuant to T-18, U. S. C. Sec. 4208(a)(2)-Clerk to file notice of appeal in forma pauperis - Execution of sentence stayed pending appeal-Previous bail exonerated by the court-P. R. Bond to be filed by the deft |

Docket Entries

| | |
|---|---|
| 6/28/74 | By Neaher, J. -Order appointing counsel filed (Bollella) Financial affidavit filed |
| 6/28/74 | Notice of appeal filed (Bollella) |
| 6/28/74 | Docket entries and duplicate of notice of appeal mailed to court of appeals |

**Indictment.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

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UNITED STATES OF AMERICA

*against*

SALVATORE MONTELLO, LOUIS MONTELLO, DENNIS CONDON, JOHN FRANCIS RIPOLL, ROBERT BOLLELLA, JAMES VINCENT SANTA MARIA, RONALD JAMES DECONZA, ANTHONY FASANELLA,

*Defendants.*

---

Cr. No. (T. 18 U. S. C. §371, §2113 (a) (b) and (c) and §2)

THE GRAND JURY CHARGES:

COUNT ONE (ACQUITTAL)

On or about and between the 1st day of December 1971, and the 20th day of December 1971, in the Eastern District of New York, the defendants

Salvatore Montello
Louis Montello
Dennis Condon
John Francis Ripoll
Robert Bollella
James Vincent Santa Maria
Ronald James DeConza
Anthony Fasanella

and one Robert Henry Denisch, herein named as a co-conspirator but not as a defendant, did knowingly and

wilfully conspire to commit an offense in violation of Title 18 United States Code, Section 2113(a), by conspiring, with intent to commit a larceny, to enter the Manufacturers Hanover Trust Company, 81-20 Northern Boulevard, Queens, New York, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation.

In furtherance of said conspiracy and to achieve the objectives thereof, the defendants

Salvatore Montello
Louis Montello,
Dennis Condon,
John Francis Ripoll,
Robert Bollella,
James Vincent Santa Maria,
Ronald James DeConza,
Anthony Fasanella

and one Robert Henry Denisch, herein named as a co-conspirator but not as a defendant, committed the following

OVERT ACTS

1. During the week of December 5, 1971, in the Eastern District of New York, Salvatore Montello, Dennis Condon, John Francis Ripoll, James Vincent Santa Maria, Ronald James DeConza, Anthony Fasanella, and Robert Henry Denisch had a meeting during which they discussed the burglary of the Manufacturers Hanover Trust Company, 81-20 Northern Boulevard, Queens, New York.

2. On or about December 13, 1971, in the Eastern District of New York, Salvatore Montello, Louis Montello, John Francis Ripoll, James Vincent Santa Maria, Ronald James DeConza, Anthony Fasanella and Robert

Henry Denisch had a meeting during which they counted and divided the proceeds of the burglary of the Manufacturers Hanover Trust Company, 81-20 Northern Boulevard, Queens, New York.

3. During the week of December 12, 1971, in the Eastern District of New York, Robert Bollella and Robert Henry Denisch had a meeting during which they discussed the burglary of the Manufacturers Hanover Trust Company, 81-20 Northern Boulevard, Queens, New York. (Title 18 United States Code §371).

COUNT TWO (NOT NAMED)

On or about the 13th day of December of 1971, in the Eastern District of New York, the defendants

Salvatore Montello
Dennis Condon
John Francis Ripoll
James Vincent Santa Maria
Ronald James DeConza
Anthony Fasanella

together with one Robert Henry Denisch, not named as a defendant, with intent to commit a larceny, did enter the Manufacturers Hanover Trust Company, 81-20 Northern Boulevard, Queens, New York, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation. (Title 18 United States Code §2113[a] and §2).

COUNT THREE (NOT NAMED)

On or about the 13th day of December 1971, in the Eastern District of New York, the defendants

Salvatore Montello
Dennis Condon
John Francis Ripoll

James Vincent Santa Maria
Ronald James DeConza
Anthony Fasanella

together with one Robert Henry Denisch, not named as a defendant, with intent to steal and purloin, did take and carry away, approximately One Hundred Fifteen Thousand Dollars ($115,000) in United States currency, which money was in the care, custody, control, management and possession of the Manufacturers Hanover Trust Company, 81-20 Northern Boulevard, Queens, New York, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation. (Title 18 United States Code §2113[b] and §2).

COUNT FOUR

On or about the 14th day of December 1971, in the Eastern District of New York, the defendants

Louis Montello and
Robert Bollella

wilfully and unlawfully did receive, conceal, and have in their possession approximately Fourteen Thousand Dollars ($14,000) in United States currency which had been taken and carried away, with intent to steal and purloin, from the Manufacturers Hanover Trust Company, 81-20 Northern Boulevard, Queens, New York, the deposits of which were insured by the Federal Deposit Insurance Corporation, the defendants Louis Montello and Robert Bollella knowing said money to have been so taken. (Title 18 United States Code §2113[c] and §2).

A True Bill.

Foreman.

United States Attorney.

MASSIAH HEARING.



RICHARD K. BERRY, called as a witness on behalf of the defendant Bollella, having been duly Sworn by the Clerk of the Court, testified as follows:

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. KLEIN:

Q Mr. Berry, by whom are you employed?

A The Federal Bureau of Investigation.

Q And what is your title?

A Special Agent.

Q. You don't have any special assignment which gives you that name "Special Agent," do you?

A No.

Q No, that is like Private, First Class --

A Special Agent, everybody has that title.

Q Regardless of the case you are working on?

A Right, sir.

Q Do you know Robert Bollella?

A Yes, I do.

Q Do you remember when he was arrested?

A July 19th.

Q In connection with this case -- July when?

A July 19th.

Q And did you have any conversations with him -- Excuse me.

Do you remember when he came into court and pleaded Not Guilty?

A No, I can't recall the date.

Q You knew he had an attorney, didn't you?

A Yes, Sir.

Q And did you know when he retained that attorney?

A No, I didn't.

Q Did you know he appeared in court to plead Not Guilty with that attorney?

A No, I didn't.

Q Did you have a conversation with him at any time after he was indicted and arrested?

A Yes.

Q How long after he was arrested did you have the conversation?

A I had a conversation with him the day he was arrested, and there was a subsequent conversation, and I can't recall how long afterwards.

Q What was the conversation you had with him the day he was arrested, what did you say, and what did he say?

THE COURT: Well, wait a minute.

I didn't understand -- Is it your position he was represented by an attorney on the day he was arrested?

MR. KLEIN: I will go further beyond that. No.

Q Did you have a conversation with him sometime afterwards?

A After the arrest?

Q Yes.

A Yes.

Q About how long after the arrest?

A I can't recall.

Q By telephone?

A No, he was here in the United States Attorney's office.

Q And do you know how he came to be in the United States Attorney's office?

A He came here by himself.

Q And was it in response to a telephone call?

A I don't remember.

Q Did you invite him to come down?

A I can't recall that, sir.

Q Did you call him on the phone and tell him to come down?

A I don't recall that.

Q Who else was present in the United States Attorney's office?

A It was Dennis Condon.

Q And who else, and you?

A Dennis Condon and myself, yes, sir.

Q And who else?

A I don't remember.

Q Was Mr. Ryan present?

A No, sir, he was not.

Q How about Mr. Schlam?

A I don't remember.

Q Do you have any records at all that can refresh your recollection?

A No.

Q You make reports, regular reports, and aren't they required by your department?

A We make reports, yes, sir.

Q Did you make any reports in connection with this case as to these, as to this conversation?

A No.

Q This meeting?

A No.

Q You made no such report?

A No.

Q Who was present when the conversation took place?

A As best I can recall, it was Mr. Bollella, Dennis Condon, myself.

Q The three of you together all the time?

A When the conversation took place, yes.

Q Well, were Bollella and Condon ever alone together?

A Yes, I believe they were.

Q And whose idea was that?

A Nobody's.

Q You left them in the room and walked out?

A They were sitting in the conference room, yes.

Q Was that room wired, to your knowledge?

A No.

Q Were you able to hear from the outside of the room?

A Excuse me.

Q Was anybody able to hear what went on from outside of the room?

A Not that I know of, no.

Q What was the conversation in your presence?

MR. RYAN: Objection.

THE COURT: No.

I thought one of the things we were going to get into here, first of all, is whether or not there was any advice of rights given, or any inquiry made with respect to this man, Bollella, as to whether he was represented by an attorney at the time.

MR. KLEIN: That was included in my questions, that was my question -- If I may --

BY MR. KLEIN:

Q Did you advise Mr. Bollella of his rights?

A No, sir.

Q Did anybody in your presence advise him of his rights?

A Not in my presence.

Q What was the conversation, what did you say, what did Mr. Bollella say, and what did Mr. Condon say, and who initiated the conversation?

A As best as I can recall, the conversation was initiated by Mr. Condon.

Q What did he say, and to whom did he say it?

A He was talking to Mr. Bollella.

Q What did he say?

MR. RYAN: I am going to object unless it relates to the issue in the hearing as to the

form of 3500 Material, that is, the Condon interviews, those are --

MR. KLEIN: I'm using it to refresh his recollection, your Honor, this man doesn't remember.

THE COURT: First of all, you haven't asked him whether these conversations pertained to Bollella or not.

BY MR. KLEIN:

Q Did these conversations that you had with Mr. Condon pertain to Mr. Bollella?

A As far as I can recall, at least one of them did.

Q All right.

Did it pertain to this case?

A Yes.

Q Did it pertain to Salvatore Montello?

A Yes, I believe it did.

Q Did it pertain to Louis Montello?

A Yes.

Q Did it pertain to Dennis Condon himself?

A Yes.

Q Did it pertain to John Francis Ripoll?

A I don't recall Ripoll.

Q How about James Vincent Santa Maria?

THE COURT: But I thought that your inquiry was to determine what if anything Bollella said --

MR. KLEIN: Your Honor --

THE COURT: (Continuing)--not what Condon said.

MR. KLEIN: Your Honor, if I can show that Condon was put under pressure and finally succumbed to it and made a deal and then a telephone call was put through to Bollella to bring him in and have him confront Condon and have Condon try and convince Bollella to substantiate his story, then I think it is all part of the package.

THE COURT: When you say, "bring him in" --

MR. KLEIN: To have him come in to visit him at the United States Attorney's office.

THE COURT: The point of it was, well, I have the impression when we started off out here that in some way Bollella was brought to this FBI office really not voluntarily, that is the impression I got, after a time when he was represented by counsel.

MR. KLEIN: That is correct -- well --

THE COURT: You haven't even established

that this was after the time when he was represented by counsel.

MR. KLEIN: Your Honor, how long that was, well, that is why I asked for the records.

BY MR. KLEIN:

Q. How long after the indictment did this take place?

A I can't recall.

Q Do you know when he was arrested?

A July 19th.

Q And over how long a period then did you have conversations with Condon?

A Subsequent to the arrest?

Q Yes.

A I had several conversations with him.

Q Over how long a period of time?

A I would estimate a week, two weeks, maybe.

Q And then after those conversations with Condon you then had this meeting in the United States Attorney's office here with Bollella; is that correct?

A I don't know if it was after the conversations or during that period of time when we were having the conversations.

Q Do you know when the indictment was handed down?

A Prior to the 19th of July.

Q And you arrested him pursuant to the indictment?

A That is correct.

Q Do you know when he pleaded?

A No.

Q Did Condon make bail?

A I don't know.

Q Where did you visit with Condon, during those conversations?

A In the United States Attorney's office.

Q Was he in custody at all times at that time?

A I can't recall.

Q Where did he sleep during that period?

A I don't know.

Q Was he in West Street?

A I don't know.

Q Do you have any records of anything?

A Where he slept?

Q Of whether he was in custody or not.

How did you make arrangements to speak with Condon? Whom did you call?

THE COURT: I thought we were talking about Bollella, all I keep hearing about is Condon.

MR. KLEIN: That is correct, your Honor, it was through Condon that they got to Bolliella. They produced Condon in this office and then they had Bolliella come in.

THE COURT: I understand what you are trying to tell me is that Condon was in effect acting as an agent of the Government.

MR. KLEIN: After he was incarcerated for a while and subjected to meetings with the agents and the United States Attorney, and he then -- and this was proven this morning -- he pleaded guilty.

MR. RYAN: I am more convinced than ever that the purpose of this hearing is to get a trial in advance of the trial, and of course the circumstances under which Mr. Condon pleaded will be an issue in this case, the defense will explore it fully before the Court, but not at this hearing.

MR. LEWIS: Your Honor, may I call your Honor's attention to the Lusterino case where this office was severely criticized. They did the same thing, they had a co-defendant indicted and then they used him as an informant to get

in touch with another defendant and have conversations with him.

Now, this is the same ploy they are using again. Now, if Condon started to cooperate with the Government and they are using Condon to set up Bollella and have him call Mr. Bollella and come down to the office, and we do know that Condon was there and the agent got there, the agent had to go there for some particular reason, he was called either by the United States Attorney or he knew what was taking place, and that makes Condon a part of the FBI, a sub-agent, he is working for them doing their bidding.

That is just what happened in Lusterino, in the Lusterino case, Judge.

THE COURT: That hasn't been established yet, Mr. Lewis. What I'm concerned about is drawing a line here between an advanced exploration of the Government's case and what struck me is a somewhat legitimate inquiry into the circumstances under which Bollella is supposed to have made statements to law enforcement officers at a time when he was represented by counsel, and that hasn't even appeared here,

that hasn't been represented by counsel as of this point --

MR. KLEIN: I ask the Court to take judicial notice that an attorney put a notice of appearance in at the arraignment --

THE COURT: When?

MR. KLEIN: That must be right in the file, if your Honor will take a look at the file.

THE COURT: This must be an earlier file because the only indictment I have in this file is the superseding indictment which wasn't filed until August 10, 1972.

MR. KLEIN: Your Honor, I have been informed that Mr. Newman was present in court and filed a notice of appearance and represented Mr. Bollella at the arraignment.

THE COURT: Yes, but Mr. Newman made it clear that he was representing a group of defendants only as a courtesy at that time for the convenience of the Court.

MR. KLEIN: That is correct.

MR. NEWMAN: That is correct.

It was very late in the day, there was

nobody here or in Legal Aid that day.

THE COURT: That is right.

You had not undertaken to act as attorney for the others, for other than those you indicated to the Court.

MR. NEWMAN: That is right, sir.

THE COURT: Right. So I don't know where we are getting to at the moment, Mr. Klein.

MR. KLEIN: I will pursue it a little further, your Honor, if I may.

BY MR. KLEIN:

Q Were you surprised to find Bollella in the United States Attorney's office that day that Condon was there?

A Was I surprised?

Q Yes.

A I had no particular reaction.

Q Did you know he was going to be there before you arrived there?

A No.

Q Nobody told you?

A No.

Q Did you know Condon was going to be there?

A Yes, I did.

Mr. Bollella, so this case would stand up and there wouldn't be an acquittal?

A We didn't tell Mr. Condon to bring in anybody, nor did we tell him to corroborate what Denisch told us, we merely took the facts as Condon presented them to us.

Q You didn't tell them what Denisch had told you, did you?

A No, we didn't.

Q Did Condon suggest bringing in Bollella?

A Yes, he did.

Q And did you go along with that suggestion?

A He suggested that Bollella would be a likely individual who would, "turn over," as Condon put it.

Q And then was contact made with Mr. Bollella; did somebody ask him to come down, and did you just drop in and --

A I don't know at what point or how Mr. Bollella was contacted; I can't recall that, but at one point he was contacted and he came.

Q By whom? By somebody in the Government's employ?

A I honestly can't recall that, sir.

Q You are telling us that sometime during your interrogations of Condon he suggested that Bollella might be a person who would, "turn over," as you put, and corroborate;

is that correct?

A Testify against the others, yes.

Q Now, what if anything was done as a result of that revelation?

A Mr. Bollella subsequently came down here, that was made known to the United States Attorney at the same time.

Q How long after Mr. Condon told you that Mr. Bollella would be a likely one to corroborate did he show here?

A As best as I can recall it was either that day or the next day.

Q Now you are telling us that it was a coincidence that Mr. Bollella walked in at the same time that Mr. Condon was there and you were there and the same day or even in the next day, that after Mr. Condon told you that he would be a likely one to corroborate him?

A I didn't say that. I didn't say it was a coincidence.

Q Well, you say he was there as a result of a design or plan or because somebody in the Government's employ called him and brought him in?

Somebody must have notified him; isn't that so?

A Somebody must have notified him.

(Continued on next page.)

Q Did you make a report of that?

A No, I did not.

Q After Mr. Condon told you that Mr. Bollella would be a likely collaborator -- by the way, who else was present; was it just you and Mr. Condon?

A When Mr. Bollella was there?

Q Before that. When Mr. Condon suggested that to you.

A I don't know who else was present.

Q Did you make a report of that?

A No, sir.

Q Isn't it what you were seeking evidence of, collaboration, isn't that important to put in the report? You didn't consider it important?

A No.

Q Did you report to the United States Attorney's office that you got a new lead that Mr. Condon suggested Mr. Bollella might be cooperating?

A I told Mr. Schlam that, yes.

Q Who is Mr. Schlam?

A Assistant United States Attorney.

Q When did you inform him?

A The same day.

Q Right after the conference?

A The same day.

Q Wasn't the conference in his office?

A It was either in my office or in the conference room which is across the hall.

Q On the same floor? In the same suite? In this building?

A In this building.

Q You told him?

A Yes.

Q Did you tell him we ought to get him in?

A Excuse me?

Q We ought to get Mr. Bellella to come in?

A I didn't suggest that to him. I informed him of the fact that was told me.

Q By Condon?

A Yes.

Q How long after that -- by the way, was this conversation with Condon in the morning or afternoon?

A I can't recall.

Q When you spoke to Mr. Schlam, was it in the morning or afternoon?

A Numerous times.

Q This particular occasion.

A I don't recall.

3 Berry - direct

Q How soon after the conversation did the other conversation take place when Mr. Bollella was present?

A It was either that afternoon or the next day.

Q Did Mr. Schlam tell you he will call or ask you to call Mr. Bollella?

A No, not that I can recall.

Q Do you know if your partner called Mr. Bollella?

A No, I don't.

Q You don't know how Mr. Bollella was reached?

MR. RYAN: I must object. This witness was asked that at least five times.

MR. KLEIN: If I didn't persist in the questions, we wouldn't have gotten to this point. He keeps saying he never once told him to bring Bollella in. Not until I asked in reverse did Bollella ever suggest it. We are trying to get at the truth here.

THE COURT: I thought the truth was that he didn't suggest that it was Dennis Condon who suggested --

MR. KLEIN: That's what I just got out of him. We also found out he didn't keep records, it was unimportant. I would like to produce any reports he made of the conversation with Condon

MR. RYAN: I thought we had settled that.

MR. KLEIN: We haven't settled anything, no, sir.

I am entitled to go into this.

THE COURT: All right, we now know that Mr.Condon is supposed to have told Mr. Bollella he was going to testify against him. This thing started off, as I recall, with your request that you ascertain what if anything Bollella told the arresting agents, interviewing agents, interrogating agents at a time when unrepresented by counsel which might be material and could possibly come out in this case and be used against him and be a total surprise to you, so you may decide whether he should or should not take the stand.

As far as I can see, the fact that Condon told Bollella he was going to testify against him doesn't cut the ice one way or another.

MR. KLEIN: I didn't hear Condon telling Bollella he was going to testify against him.

THE COURT: That's what the agent told us.

MR. KLEIN: Condon told the agent.

THE COURT: Told Bollella.

THE WITNESS: That is correct.

request to leave had something to do with the men's room?

A He just asked if he could leave and we said yes.

Q How long did he stay out?

A A little more than 20 minutes. He was gone a long time.

Q And he came back?

A Yes.

Q Do you recall anything he said during that conversation?

MR. RYAN: Which conversation?

Q The conversation with Mr. Condon and Mr. Berry.

THE COURT: We don't know whether there was a conversation.

Q Was there -- did the three of you sit in the room looking at each other or was there a conversation?

A There was a conversation between Mr. Condon and Mr. Bollella.

Q Some of that was in your presence and some was outside your presence?

A That is correct.

Q The part in your presence, did you take any part in that conversation?

A At the very end of the conversation, I asked Mr. Bollella what he was going to do.

Q What did he say?

A He said, "I can't do it."

Q Do you know what he was referring to?

A He just answered my question: "I can't do it."

Q Do what?

A Prior to this Mr. Condon had asked him if -- he told him he was going to testify against him. And if he was smart, Bollella was smart, he would cooperate with the Government.

Q Did Mr. Condon -- what did Mr. Bollella say?

A "I can't do it."

Q Did Mr. Bollella state that he was innocent, he had no part in this bank burglary?

A He didn't say one way or the other, sir.

Q Did Mr. Condon state -- do you recall Mr. Bollel stating to Mr. Condon: Why are you doing this; and do you recall Mr. Condon saying: They have me over a barrel, the only way I can help myself is to do what they tell me?

A No.

Q That wasn't in that portion of the conversation while you were present?

A I don't recall that whole conversation.

Q What else did Mr. Bollella say other than to make that one statement, "I can't do it"?

A He repeated that two or three times and after that he

15 Berry - cross

MR. RYAN: May I proceed to lay a sequential foundation?

MR. LEWIS: Go ahead.

MR. RYAN: It's all right with you, Mr. Lewis?

MR. LEWIS: Yes, you are a good boy.

MR. RYAN: May I proceed?

THE COURT: Yes.

BY MR. RYAN:

Q Are you aware a request was made of Mr. Bollella to come in to the United States Attorney's office?

A Yes.

MR. KLEIN: I don't understand how the DA gets a different answer to the same question.

THE COURT: That was the previous question that somebody objected to. At any rate, he was aware a request had been made to this man to come down. He was aware of that.

I think the question is when did this awareness develop.

Q Can you tell us when in relation to the meeting between Mr. Condon and Mr. Bollella the request was made to your knowledge?

A The exact time I can't recall.

MR. QUAGLIATA: I want to find out what Mr. Condon said regarding Mister --

THE COURT: The answer to it, Bollella made no statement, period.

MR. QUAGLIATA: Judge, that is not my understanding of it. He said he made no incriminating statement.

THE COURT: I didn't even hear the qualification incriminating. He made no statement. Certainly what was testified to here was, he listened to somebody who suggested he cooperate and he said, "I can't do it." That is a statement, it doesn't incriminate him nor does it exculpate him.

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present?

MR. RYAN: Objection.

THE COURT: Come on. That's the end of that trail for now.

MR. KLEIN: May I just ask one or two questions? Now we have discovered that we had a two hour conversation.

THE COURT: No, we did not discover that. We had a two hour period.

MR. KLEIN: Period. We had a lengthy conversation, apparently in which nobody's name was mentioned.

THE COURT: I'm not even sure we have a lengthy conversation.

MR. KLEIN: We had a conversation in which nobody's name was mentioned, and during the course of the conversation, as I understand the witness to testify, Mr. Condon urged my client, Mr. Bollella to testify in behalf of the Government in this case; is that right?

THE WITNESS: That was part of their conversations.

MR. KLEIN: What was the rest of the conversation?

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MR. RYAN: He is not proceeding on his allegation, that his client was interviewed pursuant to a threat, as he alleged, by Mr. Berry, to proceed to the U.S. Attorney's office in violation of his right to counsel.

He has no basis whatsoever at this stage to believe that Mr. Condon is going to support his claim. In essence, he is simply calling every witness that was present to find out what happened.

So far, we have Agent Berry who testified. We don't even have a date that Mr. Bollella was represented by counsel at the time.

MR. KLEIN: I'll -- your Honor, I understand there was a directive that we can inquire into this, and we asked that Mr. Condon be brought to testify. I could have asked for Mr. Condon first. We had the agent, and I figured that Mr. Condon is going nowheres. The agent could get back and do his job. So I called the agent first.

You want the dates, I'll give you the dates. I have the dates here. It was continuous representation by counsel. Mr. Newman represented

Mr. Bollella until the notice of appearance was filed by his new counsel, on August 2, and then I just came in the other day. I found these -- filed a notice of appearance today, but I think if -- Mr. Ryan keeps saying the same thing, that we are looking for discovery. I want to know about the facts, about the nefarious practice of interviewing defendants who have counsel after the case, after the conspiracy has ended and to make -- try and make a case against others in the absence of counsel.

THE COURT: I --

MR.KLEIN: Who else can I ask but the other participant? Your Honor permitted me to ask questions of one of the parties in the room to the conversation. I am entitled to ask of everyone in the room.

MR. RYAN: How about your own client?

MR. KLEIN: The Government wouldn't object if I put Mr. Bollella on. Why should he receive an immunity, Mr. Condon?

THE COURT: He is not receiving any immunity.

MR. KLEIN: Then I'd like to question him about it.

THE COURT: The whole point of the inquiry was whether Mr. Bollella had been, in effect, summoned or coerced --

MR. KLEIN: Interviewed.

THE COURT: --or pressured, or what have you, into going in to the Governmental representative's office for the purpose of being quizzed in the absence of his attorney, and whether or not during that time, any kind of statement was taken from him, which might conceivably be used against him.

MR. KLEIN: Right.

THE COURT: That was reaching. Actually, if you look at the rule, you are only entitled, under the rule, to any written or recorded statement. I have leaned over backwards here to see whether or not there was any foundation of any kind that would give a semblance of justification to the contention that this particular defendant had been -- had his rights, his Constitutional rights violated by the Government.

I see no basis for that whatsoever on this testimony that has been adduced so far.

I am not going to permit this to be turned into a preview of the testimony of the Government's witness, even though he was a co-defendant.

You are going to have ample opportunity to get at him when he takes the stand, on cross examination.

Now, that's where the kind of questions I think I can read on your face are going to be asked, and that's the place where they should be asked.

MR. KLEIN: Your Honor, at the risk of being deemed presumptuous and impertinent, may I say here that the effect of the constant repetition by the -- by the U.S. Attorney, that it's an open discovery, open discovery, seems to have the effect of having your Honor prejudge. How can you tell after one witness -- and he's only a small witness-- what the whole thing will bring out? This is not in front of a jury. We're entitled to air it out.

THE COURT: If you have a version of what occurred, put your client on, who doesn't risk anything but the possibility that I might evaluate his credibility differently.

MR. KLEIN: Your Honor, I am entitled to know the Government's version of what took place.

THE COURT: You just heard the Government's version.

MR. KLEIN: No. I only heard one man who was there for a part of a small time. I don't know what -- suppose Condon doesn't back him up? Suppose Condon controverts him? What happens in a conversation between Condon and my client where the agent was absent?

THE COURT: Now, the point of it is, as I said before, your allegation was that Government officials, Government representatives talked to your client in the absence of his counsel and you feared that they obtained statements from him.

Now, so far as I am aware, the only Government representative who was there was this agent.

MR. LEWIS: Except your Honor, if Mr. Condon, who was cooperating with the Government was used by the Government to induce a co-defendant to come down and acting in behalf of the Government, he's the one who is firing the questions, it's just the same as if the FBI agent did it. Now, it's easy to find out how the man came down there, who caused him to come down and who took over the questioning.

THE COURT: No. I think the thing to do here next is what Mr. Bollella says happened, not what Mr. Condon says.

MR. KLEIN: I respectfully except, and I refuse to accede to the Court's direction. It's my discretion. I think --

THE COURT: In thatcase, I must conclude there is really no substance to --

MR. KLEIN: I respectfully except, that your Honor has precluded me from pursuing my Constitutional rights, and you are precluding my ability as an attorney to properly represent my client. This is --

THE COURT: No, I don't believe I have. I believe now, we have had one witness who has, according to the testimony been present at this one incident, which apparently was the basis for your earlier allegation. You had ample opportunity --

MR. KLEIN: One of the bases. There were two.

THE COURT: What was the other basis?

MR. KLEIN: Another meeting with Officer Rooney and Officer Rosa. They are here.

MR. RYAN: He did make representation-- what is your representation again as to what took place at the meeting with Rosa and Rooney?

MR. KLEIN: I say another conversation, another interview took place with my client after he was indicted, and after he had counsel.

THE COURT: At which this agent was not --

MR. KLEIN: No, no.

MR. NEWMAN: Before we get into a conversation about Rosa and Rooney, may I inquire who that gentleman is sitting with his hand on his head in the back of the courtroom?

MR. KLEIN: You certainly can ask. It's Detective Samuel Rosa of the New York City Police Department.

MR. NEWMAN: Is that the Rosa you are mentioning?

That's the only reason I got up, Judge. But if he is to be a prospective witness, I think it best for all concerned, that he be excluded from this colloquy.

THE COURT: All right, I will ask him to step outside.

MR. KLEIN: All right. How about Detective

MR. RYAN: I am entitled to know the basis of your application to have --

MR. KLEIN: Nobody picked him up and forced him. He was not manacled.

MR. RYAN: What is your allegation that your client's Sixth Amendment rights were violated? Other than the fact that was a meeting? Are you claiming about -- it was brought about by duress, by threats of any kind? That he was not told --

MR. KLEIN: Is your Honor directing me to answer?

That's right, he wasn't given those warnings.

MR. RYAN: Who told your client that he had no right to have a lawyer present at the meeting?

MR. KLEIN: Who told him he had a right to have a lawyer?

I am saying once we have an attorney in the case, the Government should keep their hands off the client.

MR. RYAN: That doesn't prevent a defendant from voluntarily meeting with a Government agent.

MR. KLEIN: This man was a police officer and he received --

MR. RYAN: Knowing his rights.

MR. KLEIN: He received a telephone call from police officers, Officers Rooney and Rosa, I think it is.

MR. RYAN: It's Rosa, R-O-S-A.

MR. KLEIN: Rosa, and told to come to a conference pertaining to this.

Now, he's been, I believe, -- I believe he has been suspended, or he's off the payroll at the moment.

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MR. RYAN: I would say -- sorry.

MR. KLEIN: All I am saying here is that a man would listen to that and adhere to it. He's been a police enforcement officer all his life, and he has no record at all. You don't have to bodily carry a person in, your Honor.

THE COURT: I certainly will amend what I have said up to now, by saying I have perhaps either forgotten or wasn't fully aware that there was a separate conversation. I am going to permit you to interrogate the one or two officers whoever was there, on that subjec,t but I am not going to permit you, on the basis of what I have heard so far, to call -- to require the Government to give you an advance view of what Condon is going to say.

MR. KLEIN: I don't want that.

MR. RYAN: Detectives Rooney and Rosa would say about the meeting with Bollella. I think that's what your Honor is referring to. Condon was not present.

MR. KLEIN: For the record, let me make the offer then.

I offer to call Mr. Condon and also Mr. -- what's Berry's partner's name? The other officer?

MR. RYAN: Mr. Small. In suppose of the first branch of your motion?

MR. KLEIN: In connection with the first branch.

MR. RYAN: Can you make a representation as to what you intend to elicit from these witnesses in support of your claim that your client's constitutional rights were violated under threats or duress that you previously alleged? Can you make a representation as to --

MR. KLEIN: I said several times, and plus the fact that it's come out.. The very fact that they had a meeting with him and told him to come alone is important, and that violates his rights. No right to question him concerning this case, knowing he had an attorney, and try and make a deal with him.

THE COURT: Yes. It seems to me where -- we are getting a little bit off the track.

The point is, was he put in a position where he made some incriminating statement or statements that are going to be used against him in this case?

MR. KLEIN: The Government admitted -- yes.

The Government said that --

THE COURT: No. I know Mr. Ryan said he considered his conduct --

MR. RYAN: Incriminatory.

THE COURT: --incriminating. He used the word "conduct."

MR. KLEIN: I asked Mr. Ryan what he meant by "conduct." Did he mean his conversation? He said yes, his conversation.

THE COUNT: Did you mean conversation?

MR. RYAN: I mean the "I can't do it." I mean the "Conduct" during the conversation. Absolutely, under circumstances which an innocent person would protest the allegation made to him.

It would be in effect, an admission made by silence, but here it was the affirmative fact that he said, "I can't do it" and the way he conducted himself during the interview. I considered incriminatory.

Let me point this out.

MR. KLEIN: What about the right to remain silent?

MR. RYAN: The only way this issue will come up is if Mr. Bollella will take the stand.

Obviously Mr. Bollella will take the stand after Mr. Condon, and all defense counsel have had an opportunity to cross examine to a fare-thee-well at the trial. So all the facts they think that they need are going to be available to them before the defense is even called upon to offer any evidence, if they want to.

THE COURT: I understand.

MR. KLEIN: That's the same in every case.

THE COURT: That's why I say I think cross examination is something which should await the trial, but so far as these other police officers are concerned, now, your contention is that they too, arranged for Bollella to come and see them?

MR. KLEIN: Yes.

THE COURT: And talk to him about the case?

MR. KLEIN: Yes, sir.

THE COURT: And you want to explore the circumstances of that?

MR. KLEIN: Yes, sir.

THE COURT: And I am willing to permit you to do that.

MR.KLEIN: Thank you, sir.

THE COURT: So whom do you wish first?

MR. RYAN: Whom would you like first? Mr. Klein?

MR. NEWMAN: Judge, before you do that.

MR. KLEIN: Before we leave the first portion of it, I see -- are you Mr. Schlam?

MR. SCHLAM: Yes, sir.

MR. KLEIN: May we ask Mr. Schlam whether he made the telephone call?

MR. RYAN: Just stand up.

MR. SCHLAM: I did not, sir.

MR. KLEIN: May I ask Mr. Schlam a question?

MR. RYAN: Sure.

MR. KLEIN: Did Mr. Condon -- did Mr. Berry -- do you recall Mr. Berry telling you that he had an interview with Mr. Condon and that Mr. Condon suggested that Mr. Bollella might be able to cooperate -- cooperate and corroborate him?

MR. SCHLAM: Your Honor, I don't remember if it was Mr. Berry who told me that, but I remember that I was aware that Mr. Condon felt that Mr. Bollella in his judgment, was in a different position as a person, vis-a-vis the rest of the defendants, and he indicated that belief to me, as the assistant in charge of the case.

MR. KLEIN: And who -- to your knowledge, who called Mr. Bollella to come in and arrange an appointment?

MR. SCHLAM: I do not specifically know who called him. It would have been either Mr. Berry or Mr. Small, I believe.

MR. KLEIN: Do you have Mr. Small available?

MR. RYAN: We tried to get hold of him. We have been unable to do that.

MR. SCHLAM: It might also have been one or two of the police officers.

MR. KLEIN: What are their names?

MR. SCHLAM: Mr. Rosa and Mr. Rooney.

(Continued on next page.)

to have a lawyer present.

THE COURT: To have his lawyer present.

MR. RYAN: To have Mr. Bollella's lawyer present.

THE COURT: All right.

MR. RYAN: That is the issue as to the Condon-Bollella meeting.

MR. KLEIN: Sir, sir --

MR. RYAN: So far Mr. Klein has called Mr. Berry and he has not maintained his viewpoint and your Honor has made a finding, which, as I recall your Honor's finding, that it was not supported in any way; that is, the claim that his client, Mr. Bollella, did not know and was deprived of his right to have a lawyer present when he met Mr. Condon --

THE COURT: There certainly was no testimony or no question asked as to whether he was told to come alone, for one thing, without his lawyer.

MR. KLEIN: Whom could I ask? Nobody said they made the telephone call. The only one I could ask as to who made the call was that witness. He said he didn't make the call, so I couldn't

ask that question; he said that he knew nothing.

But I would like to correct Mr. Ryan -- by the way, I didn't say he was coerced to come down, I said he came down pursuant to what we very politely called a request, it could have been a demand.

I would like to speak to the party who initiated and invited or coerced him to come down or whatever it is. We don't know who is the party.

Now, the Government just says, all right, we will admit something, that the Government did it. But does that preclude me from covering that what your Honor considered an essential point which you tell me, this failure of proof on that point? How can I get it when the Government concedes somebody called and said come down, but I would like to cross-examine him.

Let them produce the man who called him. How many people are in the case --

MR. RYAN: Your Honor, in every criminal trial, the defense lawyers will always be able to say there is a possibility that this was done and --

MR. QUAGLIATA: This was done, it was done.

MR. RYAN: And claim it was coercion and a violation of rights, and we would have hearings ad nauseam as to what occurred during an investigation or thereafter.

Where a claim is that rights were violated, they have the burden of proving by competent evidence, that his rights were violated.

MR. KLEIN: Produce the agent who called him, give me a chance to ask him some questions.

THE COURT: I don't think there is any question but, and I have considered it carefully, I think Mr. Ryan is at a disadvantage the same with the rest of us, in that, at the date and time this occurred, I don't even know whether Mr. Ryan was in the case.

MR. RYAN: I wasn't.

MR. KLEIN: It was after, post-indictment,

Now, I think we had better get the other two police officers on the stand and see if they can throw any light on it.

Mr. Ryan, I take it, will attempt to get Agent Small here, maybe tomorrow, possibly --

Is he at a distance out of town, transferred somewhere?

MR. RYAN: I don't know, I am sorry, I can't answer that.

THE COURT: How about Berry, would he know?

MR. RYAN: Berry may be able to throw some light on it, but I can't talk to him while I am conducting this colloquy.

My point is this, from what Mr. Klein plans to elicit, can he make a representation what these witnesses will offer in support of his claim.

THE COURT: This is what you have to bear in mind, Mr. Ryan, once a defendant is represented by counsel, I would think the Government assumes a risk, when it gets in touch with a defendant directly rather than through his counsel. I wouldn't encourage that as a policy to be pursued very strongly.

What I say is, therefore, that puts somewhat of a burden on the Government to justify that nothing was done which really infringed in any way other than harmless -- if we can call it that -- a defendant's rights.

Statements were taken from him which might not have been taken from him if his counsel had been apprised, and we don't know how it would have come out, counsel might have patted him on the back and said, "Go down there," and that may be the best thing he ever could do, or he might have said, "I will come with you."

My point is, and this is the only reason I am acquiescing in counsel's position, that Government officers involved should come on the stand and let us hear what did in fact happen.

Now, Mr. Condon is something else again. I had strong doubts that a Government witness should be subjected to what you must say on the basis of the arguments I heard here, and I am not echoing Mr. Ryan when I say this, but which are essentially cross-examination of the witness, but I am not shutting the door to the point that somebody will define the area of

legitimate inquiry on that score.

For the present, I think the Government officers ought to be heard so that we can see what the state of the record is, when they get through.

MR. RYAN: All right.

With respect to the first meeting, the Condon-Bollella meeting, we will carry our burden to the hilt, to satisfy this Court that the conduct of the Government agents was anything but proper. That is the burden that we have ultimately on this hearing. But this is not the manner in which this hearing is being conducted by Mr. Klein putting on agents.

Now, your Honor denied the motions based on the evidence he had already submitted.

If you want, your Honor, I will carry that burden, I will call my own witnesses on this issue of Condon-Bollella, with a witness to show and satisfy this Court that that was perfectly proper and that Mr. Bollella knew exactly what he was doing at the time.

I will call --

THE COURT: I would suggest that would be

related.

MR. RYAN: Let me call Mr. Schlam.

Will you take the stand, please?

MR. KLEIN: While Mr. Schlam is walking to the stand, I want to point out one thing:

If my client's Sixth Amendment privilege has been violated, and if Condon participated in that violation, then the mere fact that he is a defendant, doesnt give him any greater parity than any other Government Agent who participated in the violation of my client's rights.

THE COURT: Well, I think you have to show me that Mr. Condon was in fact, acting as a Government agent rather than, as is so often the case, one defendant endeavoring to make available to someone else, an opportunity which has been extended to him, or at least regarded as an opportunity --

MR. KLEIN: The only way I feel I can do that is by examining him.

THE COURT: All right.

There is a big question in my mind as to that, but let us go forward here with the Government side.

mb 1 1

MR. LEWIS: In the interest of humanity I move we adjourn until tomorrow. We want you in the same health, your Honor, not like the other judge who preceded you in this courtroom. It is awfully hot. We've got to go on tomorrow anyway.

THE COURT: We will see about that.

Mr. ~~Ryan~~ KLEIN?, I'd like a statement from the Government here. Are there any recorded statements by the defendant Bollella, in any writing, in the Government file? That is to say, all statements that have been said to someone, whoever it may be, agents or what have you, that were written down. Anything of that kind at all. Or has that been made available?

MR. RYAN: Only to the extent it has been made available to Mr. Klein.

MR. KLEIN: It hasn't been made available to Mr. Klein.

MR. ~~RYAN~~ KLEIN?: Will you produce to us the FBI report where Mr. Bollella refused to make a statement; the report of the Police Department of the meeting -- I believe they had that in September, and --

MR. KLEIN: I have three pieces of paper which were handed to Mr. Griffin, my representative this morning. One is a blue sheet, a complaint follow-up, subject, Interview of Robert Bollella. The undersigned name is Samuel Rosa. Detective James Rooney interviewed one Robert Bollella, a subject of this investigation. This interview was conducted at the Burger Restaurant located at Avenue U and Garrison Avenue this date, the date being 9/6/72, at 11:30 hours. No results were obtained from this interview. That is one piece of paper. That's what we are going to interrogate on now, that conversation.

And the other one from the FBI dated September 9, 1972, states Robert G. Bollella was apprehended at 238 Fort Washington Avenue, Apartment 53, New York, by Special Agent James Small and Special Agent Robert P. Right. Bollella was advised of the identify of the arresting agents by Special Agent Small and the fact that he was being arrested on an indictment charging bank burglary and receiving. Bollella was furnished with a copy of the advice of rights form by Special Agent Small which he read and

signed. Bollella refused to make any statements. The following description was obtained from observations at the interview.

The third piece of paper is also from the FBI dated July 31, 1972, and it says that during the search of the bedroom of RobertG. Bollella, 238 Fort Washington Avenue, a receipt numbered F-22317 with reference to the Merchants Bank of New York Filing Department, at 434 Broadway, dated February 9, 1972, indicating the transfer of United States currency in the amount of $301.50 from Bollella to Dennis Condon, London, drawn on the National Westminster Bank, Limited, 04407474.

In addition, a Xerox copy of a note also dated February 9, 1972, which reads as follows: "Dear --" and,(obscene), "knock off the rented cars and nigh living. This is it from this end, and make it last. Don't hurry back. Signed Bob."

That's all we got.

THE COURT: All right. My question is not is that all you got, is that all there is?

MR. RYAN: Yes.

THE COURT: That is what the Government

represents?

MR. RYAN: Yes, and we will double-check it.

THE COURT: There is nothing -- you will double check it?

MR.RYAN: Yes, we will.

MR. KLEIN: Your Honor, did I make it clear before, my point is not based on any coercion, I didn't use that word. Mr. Ryan has been using it and I want to correct the misapprehension. I didn't use the word coercion. I just stated that any interview, post-indictment interview in the absence of counsel is suspect.

THE COURT: It is suspect if he made statements that were going to be used.

MR. KLEIN: Does your Honor say that he is giving a license to law enforcement officers to run rampant on searches or ignore the right to have counsel and, if no results come out, make no report and say, "Sorry, there was nothing damaging"?

THE COURT: What I am trying to say is this, and I had the impression earlier what you are seeking to do here is to not merely exclude

Government file to determine whether as a result of this interview or two interviews, if there were any. If anything turns up in writing, purporting to be what Bollella may have said as a result of being asked to come either to see police officers, or come to the United States Attorney's office, on the occasion testified to today.

From what Mr. Klein read about the report there of the two police officers, Rosa who signed it, it would appear, that that also did not produce anything.

MR. KLEIN: No results obtained.

THE COURT: All right.

MR. SHARGEL: One question that Mr. Ryan hasn't answered, is whether Condon obtained statements from Bollella and is prepared to testify to those statements. And what defense counsel says, if he obtained the statements as an agent of the Government at the time he spoke to Bollella then we are entitled to have those statements suppressed. And Mr. Ryan hasn't told us that.

MR. RYAN: You are asking for a statement by Mr. Condon.

THE COURT: Berry was there when he got there, what difference does it make?

The point is, as I said before, the Government has made the representation that you have gotten all the statements, such as there are. They are going to search their files once again. My belief is on the basis of what I have heard, on the basis of the Government's representation, that it does not expect to have Condon testify to any statements that were made if any were made, and you have had a full ventilation of the question. It is a waste of time to have you come back --

MR. KLEIN: How about the two police officers in the second meeting?

THE COURT: In the light of the paper that you have there, I think that would be a waste of time.

MR. KLEIN: This is just a conclusion.

THE COURT: If these police officers were to attempt to come in and have a different story at trial, I don't know if they are going to be called as witnesses --

MR. KLEIN: I don't know what authority they had to talk to my client after an indictment.

THE COURT: Whether they have the authority or not, is not in question. The question is whether he got anything out of it. The answer to that is, they did not. Your remedy is to suppress anything they got but apparently they didn't get anything.

MR. QUAGLIATA: My impression is not that they didn't get anything out of it -- whatever they did get out is not going to be used on the Government's direct case. We haven't heard from the prosecutor on that.

THE COURT: Is the Government going to take the position, having provided the defendant with a report that says the interview is unproductive, is the Government going to put on police officers to show the contrary?

MR. QUAGLIATA: I don't know.

MR. LEWIS: I hope they do.

THE COURT: I am sure Mr. Lewis, but I don't think that is going to happen in light of Mr. Ryan's statement.

MR. RYAN: Your Honor, I would like to point out --

THE COURT: With respect to Brady material,

is it the Government's representation, that there is no Brady material?

MR. RYAN: Correct.

THE COURT: You do represent that?

MR. RYAN: Yes.

MR. LEWIS: I want to ask one question, that conversation between Condon and Bollella, is there anything in that that may be deemed favorable to any defendant?

MR. RYAN: Absolutely not. To the contrary.

MR. LEWIS: I would like to have the Government give it to your Honor, so your Honor can look at it in camera. Why should we be bound by what Mr. Ryan says?

MR. RYAN: That is a risk we are willing to undertake in the fulfillment of our duties.

MR. LEWIS: No, no.

THE COURT: When you say the conversation--

MR. LEWIS: We didn't hear it.

THE COURT: You will hear it. As I said, first of all --

MR. LEWIS: Condon may never testify to it.

THE COURT: As I understand, the conversation

is not to be used.

MR. LEWIS: It may be favorable, that's why they don't want to use it.

MR. RYAN: Absolutely not.

MR. LEWIS: I am not bound by whatever the U.S. Attorney says. I would have to tell my clients to plead guilty in every case, if I had to rely on what he said.

MR. KLEIN: If that conversation is confessional in nature, I think I am entitled to a copy of the substance of it. I represent Mr. Bollella.

(Continued on next page.)

well taken in this respect that Mr. Ryan is describing what happened at this bank and who he expects to prove these allegations.

And so, go ahead, Mr. Ryan. And bear in mind, however, that the responsibility of the Government is always to be fair in its statements regarding the case.

MR. RYAN: Well, if your Honor please --

THE COURT: I am not implying you are not. I am simply --

MR. RYAN: All right.

THE COURT: I am simply telling you that is the Government's obligation.

MR. RYAN: Very well.

Now, ladies and gentlemen, I would like to proceed.

The question has been raised as to what each defendant's role was in this bank burglary case. And now I would like to tell you what we intend to prove in that respect.

We intend to prove, ladies and gentlemen, that this was a bank burglary that could not be committed by one man or two men. This was a bank burglary that required the efforts of many

men.

And we intend to prove each defendant's function as part of this team that burglarized the Manufacturers Bank.

We intend to prove that the Manufacturers Hanover Bank burglary didn't pop up as an idea overnight. We intend to prove that this team didn't pop up as a team overnight.

We intend to prove to you how this team got together, how it planned over many weeks and eventually burglarized the Manufacturers Trust Company.

We intend to prove to you that about three months before this Manufacturers Hanover bank burglary this team, as it eventually existed, did not exist. Denisch and Condon were not part of this team that eventually burglarized the bank three months before. But they were introduced, Denisch and Condon, to these defendants. They were brought together for the express purpose of committing the burglary. And Condon and Denisch were brought together to these defendants for the express purpose of the burglary by Mr. Robert Bollella, this gentleman in the blue

jacket.

Mr. Bollella is the man who vouched for Condon and Denisch with the rest of these defendants. It was Mr. Bollella who was the link that got the team together. It was Mr. Bollella who wasn't at the scene of the burglary during the commission of the burglary, but it was Mr. Bollella, we intend to prove, who after the burglary got $7500 for his efforts -- his efforts in assisting in the perpetration of this burglary without anyone getting caught. And the evidence will come out as to what he did.

Mr. Bollella at the time was a New York City policeman and he still is. He worked in the Chief Inspector's office. We intend to prove to you that Mr. Bollella at the time of this burglary, participating in the conspiracy in handling the money after the burglary, was not only a New York City policeman, but he was a close business associate with a Mr. Louis Montello, this man in the gray suit. Together they had their own business and it was legitimate. They were no strangers. And we intend to prove to you that Mr. Bollella had a relationship

with all of these defendants before the team was brought together.

Then we intend to prove to you who did what on this team.

We intend to prove to you who burned that hole in the bank deposit vault. Mr. Anthony Fasanella, this gentleman here in the light blue suit. We intend to prove that he burned it with a torch, acetylene torch. And he had oxygen tanks and all of the equipment necessary.

While the alarm was disconnected by Denisch, Mr. Fasanella was burning away to get the loot, and did get at the loot inside of the vault.

We intend to prove to you that there was another one of these defendants who was a burner, Mr. Ronald De Conza, this gentleman in the brown jacket. We intend to prove to you what else he did in this burglary.

We also intend to prove to you that this burglary required the carrying of substantial equipment to get into the bank. Mr. John Ripoll, Mr. James Santa Maria, in the light brown suit, were primarily responsible for carting the

equipment, where it was stored, to the vicinity of the bank.

But all of this required for this team an organizer, a captain. And we intend to prove to you who that was. We intend to prove to you that it was Mr. Salvatore Montello, the man in the dark blue suit. He was known to Denisen and Condon as Sonny Black. He was the team leader. He was the man who gave the orders. And you will see what the evidence will show in that respect.

(Continued on next page.)

Yesterday we left off where you were telling us that Mr. Denisch came to your home the day after the burglary. Do you recall that?

A Yes, sir.

Q Did he give you any money at that time?

A Yes, sir, he did.

Q How much did he give you?

A $1,000.

Q All right. Did he give you -- What did he say about your share?

A He told me --

Q From the burglary.

A He told me that my share of the burglary was approximately $15,000, that it was being held for me at Mr. Lewis Montello's house, that in the event that I should want more of my share at any time in the future that I should contact Mr. Bollella.

Q All right. After that conversation with Mr. Denisch, did you have any further conversations with any one of the other defendants?

A After that conversation with Mr. Denisch? The following -- The following afternoon I believe I had a conversation with Mr. Bollella.

Q All right. Where did it take place?

MR. LEWIS: All right. We have disagreed before.

THE COURT: Go ahead, Mr. Ryan.

Q Was anyone with Mr. Bollella at the time you had the conversation?

A No, sir.

Q What was the conversation?

A Mr. Bollella explained to me --

MR. LA ROSSA: Objection. I ask for the conversation at this point.

THE COURT: All right. Do your best to put it in terms of "he said," and "I said."

THE WITNESS: Yes, sir.

A Mr. Bollella said to me that the rest of my share was being held in Mr. Lewis Montello's house because in the event that I should be investigated, having been an ex-employee of the Holmes Alarm Company, that should a search of my home be made that there wouldn't be any large amounts of unexplainable cash.

Also at this time he told me that Mr. Montello had voiced dissatisfaction with me in my performance on the night of the burglary, that he wasn't satisfied with the manner in which I disposed of the gas bottle, and that they no longer had anything that they wanted to do with me. In

addition to this, at this time he changed his previous story --

MR. LEWIS: Objection.

Q Just tell us what was said, please.

THE COURT: Yes.

A He told me --

Q Mr. Bollella told you --

A Mr. Bollella told me subsequent to what he told me first about how -- why they were holding my share.

MR. LEWIS: This is not conversation.

THE COURT: Yes. Try to remember it is to be what you remember of someone saying something to you in the words they used, to the best of your recollection, the substance of what they said.

THE WITNESS. Yes, sir.

A Mr. Bollella told me that I was not to be allowed to have my full share at that time because the other individuals that were concerned did not trust me to be in possession of that amount of money because they felt that I would not be conscience(sic) of the manner in which I spent it and thereby draw attention to myself and anybody associated with me.

At this point I requested of him another $1,000, explaining that I had numerous personal debts which I had accumulated over a period of time which I would like

to dispose of at that time.

He asked me what they were. I enumerated the number of debts --

MR. HOCHHEISER: Objection. Could we hear what he said.

THE COURT: Yes.

A I enumerated a number of debts which I owed to members of my family, personal friends, I believe, including Mr. Bollella -- and having satisfied his curiosity as to where this money would be dispersed to, he then told me that he did not have this money in his possession, but he would obtain it for me the following night, following work, and he would go to Mr. Montello's house, get the necessary funds, and bring them to me at his girlfriend's house.

JB Q Was there anything else discussed at that meeting with Mr. Bollella?

A No.

Q How long is this after the burglary on Sunday night, the second Sunday in December?

A This would probably be three days, possibly four.

Q All right. Did you have any further meeting with Mr. Bollella about that?

A Yes, sir, I did.

Q When did they take place, and where?

A During this period I saw Mr. Bollella --

MR. LA ROSSA: I object to the answer and move that it be stricken -- not responsive to the question.

Q Did you see --

THE COURT: I will sustain that.

Q Did you see Mr. Bollella thereafter?

A Yes, sir; I did.

Q O.K., where did you meet him?

A I met him usually at his girlfriend's house, occasionally at bars in the area.

Q Can you tell us where you met him on this particular occasion? What is your best recollection where you met him?

A On the next occasion which I met him it would again probably be outside of his girlfriend's house.

Q Anyone else present?

A No, sir.

Q What was the conversation you had with Mr. Bollella?

MR. LEWIS: On behalf of the defendant Fasanella I object to this, not binding upon him, and it is not in furtherance of the conspiracy.

THE COURT: All right, Mr. Lewis, I am

going to give you a continuing objection along that line.

MR. LEWIS: Thank you.

THE COURT: For present purposes.

MR. LEWIS: All right.

THE COURT: It won't be necessary for you to interrupt.

MR. LEWIS: Fine.

Q What was the conversation you had with Mr. Bollella?

A He inquired of me as to -- He asked me if I had given the money that he had given me already, if I had used this to pay the debts that I had. I explained that I had. At this time he gave me another $1,000, instructing me to watch the manner in which I spent it, that I shouldn't do anything in a conspicuous way that would draw attention to myself.

Q Was there anything else discussed in that conversation that you can recall?

A He related the conversation that he had had with Mr. Montello, Salvatore Montello, concerning me, and again his dissatisfaction with me and dissatisfaction that he had with the services that I had performed on the night of the burglary.

Q All right. How much money have you received thus far from the burglary?

A $2,000.

Q All right. After that meeting did you have any further meetings with Mr. Bollella about the burglary?

A Yes, sir, I did.

Q When did the next meeting take place?

A It would probably be about four or five days later.

Q Four or five days later than what?

A Than the last meeting, which would place it toward the middle of the month probably.

Q Middle of December?

A Yes.

Q Now, where did the meeting take place, to the best of your recollection?

A Again I would have to say that it would either be outside of his girlfriend's house or possibly at a -- either one of the few bars that I frequented in that neighborhood.

Q Now, who was present during the conversation about the burglary?

A At this time I believe Mr. Denisch was present, Mr. Bollella, myself.

Q Can you tell us what was discussed? Who said what?

A I requested of Mr. Bollella an additional $1,000 for the purpose of buying Christmas presents and further funds in which to sustain myself during this period.

I asserted that I had disbursed the funds that I had already gotten from him for the purpose of -- I told him to pay debts. After he had asked me about that he again reminded me that I should not become conspicuous in the manner in which I spent the money. He told me I shouldn't be buying $1,000 rings for my girlfriends or anything such as this, and that he would go to Mr. Montello and get the money, and that I should be very careful in the manner that I spent it.

At this point he asked Mr. Denisch to tell me of the conversation which Mr. Montello and Mr. Santa Maria had engaged in when the money was being divided in Mr. Louis Montello's house on -- on the day of the burglary.

MR. NEWMAN: I can't hear him. He has his side to the --

MR. LA ROSSA: He is facing toward the wall.

THE COURT: Try, Mr. Condon, to keep your voice going up that alley in front, and if you go over to that corner it fades out.

THE WITNESS: Yes, sir.

Q Will you please continue with the conversation

Q What was discussed in this meeting between -- can you tell us the subjects of the conversation? Just tell us these subjects?

A Which?

Q This conversation between yourself, Mr. Bollella and Mr. Denisch?

A The dissatisfaction of Mr. Montello.

Q O.K. What else.

A The request of my part for additional funds.

Q Anything else?

A The manner in which I should spend these funds.

Q O.K. Were you given any monies at that meeting?

A Not at that meeting, no.

Q Did you have any further meetings in that regard?

A Yes, sir, I did.

Q When was the next meeting and whom did you meet?

A Approximately two days later I again met with Mr. Bollella. It would again be either in front of his girlfriend's house. I would meet with him generally in his girlfriend's house and we would leave and go outside to discuss business, or in a bar in the neighborhood. There were two or three.

Q Do you recall the names of the bars that you may have met him at?

A there was Brother's Tavern, I believe on 7th Avenue and 11th Street or Raddigan's it was also called and there was another one on 6th Avenue and 15th Street.

Q Are you able to recall where of these four places you met Bollella?

A Not in particular because I met him frequently on -- just the basis of our friendship, in any one of those places almost continuously during this period.

Q O.K. Can you tell us who was present during this meeting?

A During this meeting, it would be Mr. Bollella and myself. At this -- at this time he gave me the thousand dollars -- gave me another thousand dollars which would be the money that I requested at the previous meeting for Christmas presents, again with the warning of the manner in which I should spend it.

MR. KLEIN: I object to the warning, your Honor, and ask exact words. I ask that be stricken and the jury told to disregard it.

Q Tell us exactly what was said?

THE COURT: All right. I'll direct the jury to disregard it.

Now, try as best you can to say what he said to you.

THE WITNESS: He said something to the effect that -- not to be stupid, to be careful how I spent the money. That I should not do anything that would attract attention to myself and thereby to anyone who was associated with me.

Q Anything else discussed that you can recall at this meeting?

A Not that I can remember. No.

Q Did he give you money at this meeting?

A Yes.

Q How much?

A A thousand dollars.

Q Now how much money have you received from the burglary?

A $3,000.

Q $3,000? All right.

And what period of time are we talking about now, in December?

A The third week.

Q The third week?

After that meeting, did you have any futher meetings with Mr. Bollella about the burglary?

A Yes, sir, I did.

Q Where did the next meeting take place?

A I met with him at his girlfriend's house. Shortly after I arrived, Mr. Denisch arrived also. Mr. Denisch and Mr. Bollella and I took a ride in Mr. Bollella's car.

Q And where did you ride to?

A There is a secluded area down by the piers in Brooklyn.

MR. KLEIN: I object to this line of questioning. It's beyond the expiration date of the conspiracy as alleged in the indictment.

THE COURT: Overruled.

MR. KLEIN: Exception.

MR. LA ROSSA: May I interrupt just to hear the last answer? I missed the last few words.

MR. RYAN: Mr. Reporter, would you please read the last answer back?

MR. LAROSSA: Your Honor, I was asking you to do that, not Mr. Ryan.

THE COURT: Well, Mr. Reporter, will you please do it?

MR. HOCHHEISER: We don't want Mr. Ryan to seem more important than we. That's why we object.

BY MR. RYAN:

Q Can you try to pin this down, as to time?

MR. NEWMAN: Thank you, sir.

THE COURT: Mr. Lewis, it isn't necessary to imitate.

MR. LEWIS: It's an involuntary gesture.

THE COURT: I'm sure the jury will observe everyone who is up there, including yourself when your time comes.

MR. LEWIS: All right.

Q Can you fix for us the time that you took this car ride with Mr. Bollella and Mr. Denisch?

A Only that it would be at night.

Q Can you fix the day?

A No, sir.

Q Can you fix the week in December?

A It would be the week after Christmas.

MR. HOCHHEISER: Objection, your Honor, on the grounds --

THE COURT: The week after Christmas?

MR. HOCHHEISER: Yes, sir. Yes, sir. The week after Christmas would be after the 24th of December. The conspiracy charged ends on the 20th of December.

THE COURT: Yes, but you know, Mr. Hochheiser, quite well that the Government is not pinned down to exact dates in the indictment.

MR. HOCHHEISER: I understand that, your Honor.

THE COURT: Doesn't that end the matter?

BY MR. RYAN:

Q Now, Mr. Condon, can you tell us whether you had any discussion in the car about the burglary?

A Yes, sir, I did.

Q Will you tell us who said what?

A I again asked Mr. Bollella for funds. He asked me what had happened to the money which he had given me previously. I explained to him the manner in which I had spent them. He asked me what I was going to be doing inasmuch as spending the rest of it was concerned. I told him that I hadn't as yet made up my mind but at this time I was contemplating a trip out of the country for a period.

He then asked me where I was planning on going. I told him I was planning on going to Europe probably to England where I have acquaintances.

He thought about this for awhile, told me that this would be a very, very good idea, that I should be out of

area and the people would conclude, as a result of my occupation, being a seaman, that my departure was ordinary and would not arouse any suspicion and I would not be -- be able to be under the surveillance of anybody who would be interested in my activities, should I be under suspicion.

He then inquired of me as to how long I expected to go for. I told him that I didn't make up my mind as yet, probably in the vicinity of two months, possibly longer.

At this time he asked me how much I thought it would be necessary for me to take with me to sustain me for this period of time. I told him that a couple of thousand dollars would probably be sufficient, that if I needed more that I would get in contact with him.

At this point he interjected that under no circumstances were I to leave the country was I to get in contact with him for purpose of having him send me funds.

He said that since the idea of my going was a good one, that he would give me more than I asked for originally, so that I would not find it necessary at some later date to request him to send me funds.

That's basically the extent of --

Q Of the conversation in the car?

A That conversation.

(continued on the next page.)

DIRECT EXAMINATION

BY MR. RYAN (Cont'd):

Q That is the week after Christmas?

A Yes, sir.

Q Did you ever go to Europe?

A Yes, sir, I did.

Q When?

A I believe I left January 2nd.

Q Did you ever have any conversations with Mr. Bollella before you left?

MR. LA ROSSA: I missed the answer. I'm sorry.

MR. RYAN: Mr. Reporter, would you --

THE COURT: Yes.

MR. RYAN: (Continuing) -- please read the answer back?

(Answer read.)

BY MR. RYAN:

Q Did you have a conversation with Mr. Bollella before you went to Europe?

A Yes, sir, I did.

Q When did it take place?

A Approximately two days after the last one.

Q That would be before -- would that be before

the beginning of 1972?

A Yes, sir, I believe it is.

Q Where --

A Might have been New Year's Eve.

Q Where did it take place?

A Again, outside of his girlfriend's house.

Q Who was present?

A Mr. Bollella and myself.

Q What was the conversation?

A He at this time gave me $4,000 in small bills, which he explained to me was part of my share, it would be deducted from the total. Told me that he was giving it to me at this time so that I could make arrangements to either convert it into Travelers' checks or into larger bills which would make it easier to travel with.

He also at this time told me that I should be careful, not to cash too much of this money or change it into larger bills in any one place. And some of the money was burned and he told me that I should do my best to separate this burned down and distribute it evely as much as possible amongst the various places where I was to change it into larger bills.

Q Was there any other conversation at that meeting?

A At that meeting, I informed him that I had made reservations to depart just after the 1st of the year. He informed me that I would be able to -- if -- to turn in the rented car that I had the day before my departure, that he would come to my house and give me a ride to the airport.

Q Before you went to the airport, did you meet with Mr. Bollella?

A Yes, sir, I did. Came to my house.

Q Anybody else?

A Mr. Denisch.

MR. KLEIN: I didn't hear the answer, your Honor.

THE COURT: "Mr. Denisch."

MR. LEWIS: "Mr. Denisch."

Q How did you get to the airport from your house?

A In Mr. Bollella's car, accompanied by Mr. Bollella and Mr. Denisch.

Q And was there any further discussion about the burglary before you boarded the plant at the airport?

A When I got into the car, Mr. Bollella gave me another thousand dollars, told me that this was in addition to what I had received already and that it was just in the

event that I were to run short, that this would prevent me from necessitating my contacting him to request further funds.

Other than that, he wished me well and that would be the extent of --

Q So how much money have you received now, for your share in the burglary?

A Approximately $8,000.

Q All right. And then you went to England?

A Yes, sir.

Q Or where did you go? I'm sorry.

A I went to England.

Q You went to England. Where did you stay in England?

A In London.

Q You mentioned that you had some acquaintances in England. Who were they?

A Yes, sir. One of them is a sister-in-law of Mr. Denisch. There were also a few people who worked over there for a shipping company whom I had known slightly when they worked for another company, were working over there at that time. And there was one fellow in the service.

Q All right.

Now, did there come a time when you came back

to have been so taken.

Are you saying that this evidence is coming in with respect to that count against Bolllella?

MR. RYAN: Absolutely.

THE COURT: Now, what about the timing of that? You say that this charges that on or about the 14th day of December -- are you referring by the use of the $14,000 figure to the amount of money they had for Condon only?

MR. RYAN: Yes.

THE COURT: Is that what that relates to, the Condon share? You said they did have it, did receive, conceal --

MR. RYAN: They also held Denisch's share, but Denisch got a share in full, as I recall. They also held Denisch's share.

THE COURT: And 14 thousand is supposed to report what? Both Condon's and Denisch's shares?

MR. RYAN: 14 thousand is Condon's share. A separate 14 thousand is Denisch's share.

MR. KLEIN: Only 14 altogether.

THE COURT: It only says 14 thousand.

MR. RYAN: Is that what the indictment says?

THE COURT: Yes. It doesn't say 28 thousand.

COLLOQUY

(Short recess.)

MR. LEWIS: On behalf of my colleagues we have no objection.

THE COURT: All right, Mr. Warsher, you may join your colleagues.

MR. KLEIN: Your Honor, I wish to call to your attention something that would protect the record and that is in connection with a possible Massia situation.

You recall at the beginning of the trial we had a pre-trial hearing at which time Special Agent Berry testified and I attempted to call Mr. Condon as a witness and I was precluded.

It now develops through Mr. Condon's testimony that he did have a post-indictment discussion with Mr. Bollella, my client, and afterwards he reported the details or the gist of the conversation to Mr. Schlam, the Assistant United States Attorney.

MR. RYAN: I don't follow that at all.

MR. KLEIN: Mr. Bollella will take the stand in his own defense and he will testify as to what happened and what transpired and what conversation took place at that post-indictment

conference, and among the things he will tell will be how much of the defense he disclosed to Mr. Condon, and Mr. Condon, who then conveyed the gist of the conversation to Mr. Schlam, alerted the Government of the defense and therefore we find ourselves in a situation where the evidence put in in this case is tainted because it intertwines itself around the defense that was disclosed.

At this point I would also like to exclude Mr. Schlam and Agent Berry from the balance of the case, inasmuch as they may be called as witnesses and probably will be called as a witness in a Massia hearing.

MR. RYAN: I am afraid that Mr. Klein's arguments are made on facts not in evidence before this Court, facts that he had an opportunity to elicit and could not and did not elicit on the hearing held on the Monday before the beginning of this trial.

The hearing that was held by the Court pursuant to his motion established that there was no violation of anyone's rights in connection with this meeting between Bellella and Condon

and the United States Attorney's office, and your Honor denied the motion to suppress any such statements.

Counsel then compounded the matter by conducting a cross-examination of Condon as to what happened at the meeting, predicating his questions on his allegations of his client as to what took place.

He actually went into this matter as to the meeting that he now complains about on cross-examination of Condon on the theory that his client was approached, and implicated himself and others in this case. Now he intends to rebut it on direct as to what happened at that meeting.

I know of no rule that would prohibit that.

MR. KLEIN: The situation I am concerned with is the fact that the Government had no right to have a post-indictment conference with my client in the absence of counsel, and that I think your Honor had indicated that had there been any incriminating statements made by my client, I believe your Honor indicated you would have suppressed it.

I believe the reason for your ruling was

that the agent testified that he did not incriminate himself and therefore your Honor felt there was nothing incriminating and you denied my application to continue the proceeding by calling Mr. Condon as a witness.

THE COURT: I am not clear again what relief you are asking for; merely the exclusion of Mr. Berry?

MR. KLEIN: I am asking for a Messiah hearing. If my client disclosed his defense to Mr. Condon who in turn disclosed that to Mr. Schlam, then the Government had an advantage here which they were not entitled to have and I say that any evidence which came in is tainted by the pre-trial disclosure of the defense.

THE COURT: Well, have you --

MR. KLEIN: I would move to dismiss, then, your Honor.

THE COURT: Have you looked at the hearing we had on that?

My notes indicate that nothing is related by Condon here that added anything to what I had in my notes on the original hearing, the suppression hearing.

MR. KLEIN: The only thing that we did not have in the pre-trial is the fact that Mr. Condon then reported the conversation to Mr. Schlam; but we don't have in your notes this matter because we were not permitted to bring it out and it was the private conversation between Mr. Condon and Mr. Bollella.

THE COURT: Private conversation?

MR. KLEIN: Yes. Mr. Berry testified that during part of the conversation it was Mr. Condon and Bollella who were alone and he was in there part of the two-hour conference.

Now, Mr. Condon testified he was alone in the room with Mr. Bollella and that Mr. Berry came in occasionally.

THE COURT: I am still trying to see -- you say you are acting on the supposition that something was said in the conversation between the two which may have compromised your client?

MR. KLEIN: That is correct. I am calling your attention to it now before we get to it because I think at some point I would request a Messiah hearing.

THE COURT: Yes, but we have had in effect

a Messiah hearing, haven't we?

MR. KLEIN: You did not permit me to bring in Condon at that time, and at that time I did not put Mr. Bollella on the stand, but he is going to be put on the stand here.

That hearing ended fairly abruptly when the agent said there were no incriminating statements made by Mr. Bollella. He just said I cannot do it.

THE COURT: But isn't this cured by your opportunity to cross-examine Condon, if you wish?

MR. RYAN: And he did.

THE COURT: Well, I know, but of course he did conduct that cross-examination, I take it, before Condon made statements concerning Bollella; is that what you are saying?

Your cross-examination did not go into that subject; is that correct?

MR. KLEIN: No, I did not. Actually, Mr. Lewis brought it out.

THE COURT: Mr. Lewis brought it out?

MR. KLEIN: Yes.

MR. RYAN: I am sorry --

THE COURT: Do you have some different recollection?

MR. RYAN: Yes.

THE COURT: Condon did not testify previously on the July 2nd suppression hearing?

MR. KLEIN: No.

MR. RYAN: On page 1016, your Honor, and in the following pages you will find extensive examination as to what took place at this meeting.

MR. KLEIN: Mr. Lewis brought out yesterday that Mr. Condon reported the result of the meeting to Mr. Schlam who was in charge of the case at the time.

THE COURT: Well, I have gotten his testimony on cross, your cross of Condon.

MR. KLEIN: Mr. Ryan just showed me his copy but my recollection is that Mr. Lewis elicited an answer, and that is he asked Mr. Condon did you report the conversation you had with Mr. Bollella to anyone; and he said, yes, he reported it to Mr. Schlam.

In other words, the United States Attorney knew at that time the contents of the conversation, and if the contents of the conversation

disclosed prematurely what the defense would be, then the Government was illegally in possession of facts which we were to avail ourselves during the defense of the case.

THE COURT: I am not sure that that follows. The Second Circuit has held that voluntary statements by a defendant do not violate any Messiah rule.

MR. KLEIN: Not where, sir, Mr. Ryan had conceded in the pre-trial hearing that somebody from the Government's office called Mr. Bollella to come down and he conceded that the call came from the Government.

THE COURT: I am not sure of that. He seemed to be doubtful about it.

MR. KLEIN: Do you recall that?

MR. RYAN: There was a call to Mr. Bollella about coming down, but that doesn't make anything involuntary.

MR. KLEIN: Here is a man who had an attorney --

THE COURT: You see, it was Mr. Berry -- Mr. Berry was the one that testified that he did not know how it was done.

MR. KLEIN: Right, and Mr. Ryan conceded a call was made.

THE COURT: Did he say he made it?

MR. RYAN: Condon said he did not make it or didn't recall making it.

MR. KLEIN: Mr. Berry said Condon suggested to him that Bollella might be a witness.

THE COURT: That was Berry's testimony.

MR. RYAN: So what?

(Continued on next page.)

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(OUt of the hearing of the jury.)

MR. KLEIN: Mr. Condon suggested to Berry that Bollella may become a Government witness whereupon a telephone call was made to Bollella and he came down in the absence of counsel and he had a conversation after which Condon told the U. S. Attorney what took place.

If at that conference Bollella made disclosures of his defense which are taken advantage of by the Government, certainly by Condon if he knew, Condon knew that and Condon was testifying against Bollella, there is nothing to prevent Condon on his own, without even telling the Government, from contravening Bollella's anticipated testimony in tailoring his own testimony that way knowing what the testimony would be.

THE COURT: As to that I can only say any defendant who takes the stand does so in the expectation that he is under oath and he is going to tell the truth and if he doesn't tell the truth and the Government has a witness who can prove he isn't telling the truth, I recognize the practice of that, but I don't get your

point that you feel that now the Government is in possession of something it shouldn't have been in possession of.

MR. RYAN: What do you base that on? What evidence in the record do you base that on?

MR. KLEIN: I am saying Mr. Bollella will testify as to the evidence he disclosed to Condon and if he has told Condon something of his defense, the Government isn't entitled to a defendant's defense in advance to trial.

There is nothing to prevent Condon from perjuring himself. He's out there to try to get a light sentence.

THE COURT: That seems to be predicated on a number of suppositions as I see it, first of all that there is going to be occasion for rebuttal, if there is occasion for rebuttal, the witness is going to perjure himself despite his oath.

MR. KLEIN: We have a premature disclosure of a defense at a meeting which shouldn't have been called.

THE COURT: That's a question whether it should or not.

MR. KLEIN: That's why I ask for the hearing.

THE COURT: The point is it would appear that the agent who testified -- I don't recall --

MR. RYAN: I offered to call him.

THE COURT: That he did not initiate this, that he was of the opinion that the suggestion came from Condon.

Now, if Mr. Bollella responded on a voluntary basis, that doesn't necessarily mean that anything he said is thereby insulated, if it was on a voluntary basis.

MR. KLEIN: We have an FBI agent calling a man as merely acquiescence --

THE COURT: No, Mr. Berry said he didn't call him.

MR. KLEIN: Somebody from the Government called him.

THE COURT: Condon made the suggestion according to the testimony on the suppression hearing.

MR. KLEIN: Mr. Ryan concedes that somebody from the Government did make the call.

Isn't that right?

MR. RYAN: That's right.

MR. KLEIN: He came in response to a telephone call he got from the Government.

THE COURT: He didn't have to accept that.

MR. KLEIN: But he did. I think the Government acts at its peril to deal with a defendant in the absence of counsel after indictment.

We should certainly explore the meeting.

THE COURT: Do you think we should suspend matters now and have a hearing as to what was said?

MR. KLEIN: I would think so to protect the defendant. I think the Government acts at its own peril to proceed without it. If there is determined there is a tain carried forward from hat post-indictment meeting, then I would move to dismiss the indictment as against my client.

MR. RYAN: May I be heard?

THE COURT: Yes.

MR. RYAN: Number one, it was made unequivocally clear by the Court to Mr. Klein and the defendant Bollella that at the Monday hearing when he raised this issue that he had

every right in pursuing his motion to establish his allegation that his client was threatened- to call his client to the stand and give his client's version so the Court could take that into account and the Government could offer its evidence and the Court could take all the events into account and determine whether the defendant Bollella was taken by the Government to get evidence against him.

I said at that time -- I will withdraw that. The defendant Bollella did nothing except to call Agent Berry which established nothing more than Bollella was contacted by the U. S. Government for a meeting with Mr. Condon.

There is absolutely not shred of evidence that it was coercive or that the meeting was had to obtain evidence against Bollella.

NOw, Condon has testified. As I said I did not intend to offer any evidence in the Government's direct case against the defendant Bollella's direct conduct which I consider and the jury can find to be incriminatory at the Bollella-Condon meeting, it has not been offered but on cross-examination, Mr. Klein, counsel for Bollella

has propounded questions to the witness Condon about this meeting with the implication that Condon was trying to falsely implicate Bollella and get him to testify falsely against the remaining defendants in the case.

There is not one shred of evidence in this record that there was any defense disclosed by Mr. Bollella, nothing, nad to interrupt this trial at this particular time would be disruptive, contrary to all the precautions taken by the Court before the jury was selected.

I can tell your Honor that in order to meet the issues created by Mr. Klein and Mr.Lewis as to what took place in the U. S. Attorney's office, I intend to elicit from Mr. Condon what he says happened at that meeting and there was nothing disclosed about any defense that they had.

As a matter of fact, I don't even know what the defense is now except that Condon is lying. So it would disrupt this trial for no legitimate reason whatsoever to interrupt this with the so-called Messiah hearing.

MR. NEWMAN: Judge, I know you have enough

7

troubles and you don't have to hear from me to compound any others, but I feel compelled to speak at this moment.

As I remember the history of this situation, we had asked -- Mr. Klein had asked for Mr. Condon to be called as a witness in that preliminary hearing and your Honor felt that would be an unnecessary so-called two bites of the apple on behalf of defense counsel and Mr. Ryan resisted that invitation very strenuously.

It now develops that Mr. Condon said, and again I am handicapped by not having the minutes --

MR. RYAN: I offer them to you.

MR. NEWMAN:--in response to somebody's question that he had a meeting with Mr. Bollella and he spoke to Mr. Schlam after that meeting.

MR. RYAN: Even if he spoke to Mr. --

MR. NEWMAN: May I finish my statement?

MR. RYAN: I'm sorry.

MR. NEWMAN: I think at this juncture we are entitled to find out, when I say "we" I am putting ourselves in without the Court's

permission perhaps, but I say"we" for a reason.

I think when a defendant is indicted, sir, and there is a conversation by any agent of the Government, whether that agent be a duly sworn agent like Mr. Berry or what is clear at that juncture that Mr. Condon is an agent for the Government at that point because he has now begun to testify for them, begun to receive subsistance, I say he is an agent or instrument of the Government at that moment.

The minute that conversation takes place, the question of force, the question of fear, the question of coercion is no longer an issue. I say a reading of Messiah and Spano indicate that post-indictment, the Government's obligation becomes stronger. They haven't even met their burden where there is a Miranda warning because post-indictment,particularly where they know there is a lawyer representing a defendant, they cannot question that defendant unless the lawyer is present.

That's my reading of Spano and Messiah. Therefore, I think that Mr. Klein's application is perfectly pertinent at this point to ascertain

9

what it is that Condon told Schlam, whether in fact it constituted information that he elicited from Bollella, whether it helped in this prosecution, where it furnished information.

I want to indicate that I don't think I stand in the position of a trespasser. There is merit here. Mr. Ryan says that in order to meet what he considers the evidence adduced on cross-examination by Mr. Klein--I think he said Mr. Lewis, I am not sure of that -- but he is going to seek on redirect examination the conversation from Condon concerning what occurred.

I am not going into that aspect, whether that's permissible, I know you will rule on that, your Honor. This opens a new dimension in the case insofar as I can see, insofar as the other defendants are concerned.

Now, what they are offering is a statement of Bollella's and it is a post-indictment statement of Bollella's which may entitle some of these defendants to a severance if, in fact, that statement incriminates them, as it would pre-indictment and a Bruton problem arose.

Now, I think it is a propitious time if in

10

fact that's the offer of proof, to hear what is is that Mr. Condon is going to relate on redirect.

The obvious answer is that Bollella is going to take the stand. Well, I don't know if he is. The minute it is sought to be elicited from Condon what Bollella said to Condon which involves Santa Maria, I am going to move for the withdrawal of a jury.

I don't know what Mr. Klein is going to do and I don't know if a witness is going to take the stand until the witness is sworn and takes the stand.

THE COURT: Let me ask you one thing, Mr. Ryan, because I am familiar with the rule concerning conspiracy statements in the circumstances that exist that,exist with respect to Condon as a cooperating witness.

If it is your intention to elicit those, what purpose are you attempting to serve by bringing out his statements?

MR. RYAN: I am attempting to rebut the impression created by the questions on cross-examination and in the opening statements

that this was an attempt by Condon to get Bollella to falsely implicate himself and the others by testifying as a Government witness.

This is a subject matter brought up at -- this matter is a subject brought up at cross-examination. Nobody has asked him what was said and I intend to elicit what, in fact, was said and what happened at that meeting.

MR. KLEIN: I asked him specific questions and he denied each one.

MR. RYAN: YOu never asked him what was said. You asked an improper question.

MR. KLEIN: I did.

THE COURT: Well, it is true, you didn't ask him what was said, Mr. Klein. Maybe you had good reasons for doing it, but the fact remains that he was subject to your cross-examination and if as Mr. Ryan says -- I must confess I am a little hazy about the opening, but certainly if an attack has been made as clearly has been made in cross-examination here on the credibility and motivation of a principal Government witness, I don't see how I can

hamstring the Government's attempt to rebut any such inferences, even if it rubs off some dirt on the defendants.

MR. KLEIN: You see, your Honor, the Government had no right to callthis meeting, number one. They run the risk.

THE COURT: We have been through that. I have ruled against you on that because frankly I don't think you have sustained the burden you have to show that Mr. Bollella's appearance there was involuntary. To me that was the crux of the whole matter and frankly I was surprised when you didn't put him on the stand and nothing he said could have been used against him.

You know that.

MR. KLEIN: I understand. I didn't say he came down here on coercion. I didn't say he was forced to come down.

THE COURT: If a man doesn't come down under coercion --

MR. KLEIN: A man who submits to higher authority.

THE COURT: A man who is a previous police

officer and makes statements I would have to be unsophisticated to believe that he didn't know full well what he was doing.

I am as mystified as you are unless, of course, you may have the benefit of conversations you had with him.

MR. KLEIN: He's going to relate the telephone call he got to come down here and he will tell it on the stand. What I am trying to do is to prevent a mistrial at that point and have it out here.

THE COURT: Well, you mean you want to put Bollella on the stand now?

MR. KLEIN: I was a Messiah hearing now in the absence of the jury. Otherwise it will all come out on the record and I don't know which way it will fall.

At that point there certainly will be applications for mistrial. He will testify as to why he came down, who called him and what was said to him and that is part of him coming down here. We will go into the conversation that Condon had with Bollella, I have to indicate the circumstances under which Bollella appeared.

He will testify who called him and what was said to him.

THE COURT: Are you suggesting that he came down here because of threats?

MR. KLEIN: He is going to testify that he came down here after receiving a telephone call from Agent Berry, who told him substantially that they had Condon in their hip pocket and Condon was talking and if he knew what was good for him, it would be best for him to come down here, something to that effect.

It is not verbatim. He panicked and came down here. I think anybody under indictment receiving a telephone call like that from a Government agent who tells him that somebody has put him in the case and they have the other fellow in the hip pocket --

(Continued next page.)

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THE COURT: Why didn't you bring that out at the beginning? Why do you wait until the middle of a trial?

MR. KLEIN: I didn't know we were going into this deeply here. Mr. Lewis brought out a question.

THE COURT: You had Barry's statement. Barry denied making the call.

MR. KLEIN: Yes. I couldn't go any further at that point because this is what's going to come out now.

THE COURT: You could have put Bollella on to show that it wasn't so. If what you tell me is true now, you say it's Barry that did make that call.

MR. KLEIN: Yes, sir.

My questions -- I kept asking Barry if he made that call and he denied it.

MR. HOCHHEISER: Excuse me, your Honor.

I think there was, if I remember correctly -- I have the minutes but I don't have them with me right this minute.

THE COURT: I am looking at them.

MR. HOCHHEISER: I think there was a

117 A



stipulation or concession that some agent of the Government had made the call. I recall during the hearing we were going round about trying to get some evidence as to who made the call and it seemed to me that the real issue was whether it was a governmental agent as opposed to specifically who.

And if I'm not mistaken, I think it was agreed for the record that it was a governmental agent but, as I say, I didn't have the minutes in front of me.

MR. RYAN: Your Honor, whatever you eventually rule on this motion, it's made now, we -- we have precious time to use in the prosecution of this case. And right now Mr. Lewis is conducting on behalf of the defendant Fasanella a cross-examination of Condon.

May I respectfully suggest that we could proceed -- with Mr. Lewis' cross-examination and if your Honor feels a hearing is necessary to get into all of these matters that it be done after the cross-examination is concluded.

It's now -- we were supposed to start

118A



at 1:00. It's now eight minutes after two and we are not going to sit tomorrow afternoon or Friday.

THE COURT: Well, I think we should proceed with Mr. Lewis' cross-examination, Mr. Ryan. I must confess that I thought we had plowed this field at the time of your original suppression motion, when all of this could have been brought out. And I think now to raise it again in the middle of the trial doesn't strike me as warranted consideration by this Court.

MR. KLEIN: If your Honor will recall, I think when I made the application I told you I had just come into the case, a day or two before, and just met the client here for the second time and he told me about it and I raised the issue and your Honor started this hearing right at that point.

Since then I have been talking to him and he tells me it was Berry He just told Mr. Sonenshine it was Berry that called him and told him to come down and in view of the fact that Mr. Ryan is going to open up

conversation that took place allegedly between Bollella and Condon, we don't know what that conversation was and I certainly think that we are entitled to a separate hearing on this point and I'd like to have Mr. Bollella testify on it and accordingly call Mr. Condon -- call Mr. Berry who was present there. They contradict each other, by the way.

THE COURT: Well, let me say this.

MR. KLEIN: Mr. Schlam.

THE COURT: To the extent that you asked for the exclusion of Berry and Schlam from the courtroom at a time when Condon testifies on this, if he does, I will grant that application and direct --

MR. RYAN: If he does.

THE COURT: If he does. I will direct Mr. Berry and Mr. Schlam be excluded from the courtroom. That much we will decide on right now.

As for the rest of it, I'd have to give it some further thought.

MR. KLEIN: You will reserve on the rest, your HOnor?

120B



THE COURT: I think I will.

MR. FISCHETTI: As your Honor reserves, may I specifically at this point join in Mr. Newman's application regarding those conversations? Without going into the fact of whether or not the appearance was voluntary or involuntary, if there is a statement made by Mr. Bollella to Mr. Condon in any way implicating Mr. DeConza, even to the extent of saying that he knows Mr. DeConza, at that point I believe under Bruten, post indictment, your HOnor, and certainly post conspiracy, I would have to move for a severance at that point.

I'm talking about the actual conversation which Mr. Ryan says --

MR. SONENSHINE: Under your Honor's earlier ruling, any such application would apply to all counsel.

THE COURT: Right.

MR. HOCHHEISER: May -- I'm sorry. May I specifically state also that in addition to the Bruten type situation, which we've all joined in, there is another aspect to the

standing of other counsel in this motion, and that is that there is a possibility that to the extent that any defense was revealed by Mr. Bollella to Mr. Condon, as Mr. Klein has indicated, since the defendant's presumably and actually have been preparing a defense as a joint effort, at least in certain respects, I feel that we should all join -- certainly Mr. Ripoll joins in this application on the grounds that to the extent that any of Mr. Bollella's defenses may have been revealed, so too may have Mr. Ripoll's and the other defenses be revealed or the joint defense be revealed.

THE COURT: All right. As I told Mr. Sonenshine, everybody can have the benefit of this.

Do you have another newspaper clipping?

MR. NEWMAN: Yes.

THE COURT: I saw it, too. Do you want to mark it, is that the point?

MR. NEWMAN: Yes, sir.

THE COURT: It doesn't change the situation, I take it, as far as you and your --

122A



D E N N I S C O N D O N, having been previously duly sworn by the Clerk of the Court, resumed the witness stand and testified further as follows:

CROSS EXAMINATION

BY MR. LEWIS: (cont.)

Q Mr. Condon, after you left the courtroom yesterday, did you have occasion to go to Mr. Ryan's office?

A Yes, sir.

Q And how long were you there?

A Approximately 10 minutes.

Q And this morning, were you in Mr. Ryan's office?

A Yes, sir.

Q How long were you there?

A I was there twice, total for approximately a half hour to 45 minutes.

Q Did you discuss your testimony in this case?

A Yes, sir.

Q And did you discuss what you testified to in answer to my questions during cross examination?

A Yes, sir.

MR. RYAN: Your HOnor, I'd like a statement that the direction previously given to the witness was withdrawn by the Court at

the close of yesterday's session and there was no prohibition whatsoever from the Government talking to its own witness.

MR. NEWMAN: Judge, may we have a side bar, please? I'm sorry, Judge, to do this so soon after the jury came out.

MR. HOCHHEISER: I'd object to the record to such statements about a side bar, your Honor.

(Side bar follows.)

THE RYAN: As I understood your Honor's ground rules at the beginnning of the day -- at the beginning of the trial, which seems like an eternity ago, your HOnor indicated that none of us were to make speeches from the well of the courtroom.

THE COURT: That's true, Mr. Ryan, and one of the things that caused me concern was that I wasn't sure that I had made that direction in the presence of the jury.

MR. NEWMAN: You didn't.

MR. RYAN: Mr. Lewis developed it on cross-examination yesterday, that there was a direction by the Court on cross-examining Condon,

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GR/elc

(In open court)

REDIRECT EXAMINATION

BY MR. RYAN (continuing):

MR. SONENSHINE: May I ask your Honor to merely instruct the jury that a question asked but not answered constitutes no evidence, after your Honor has ruled the question should not be answered?

THE COURT: Yes. I have sustained your objection.

MR. SONENSHINE: Yes, but some time has gone by.

THE COURT: All right. Well, I'm going to repeat my instruction to the jury, that it is the answer to the question, and not the question, which matters.

Go ahead, Mr. Ryan.

BY MR. RYAN:

Q Mr. Condon, will you tell us how the burglary of the Markel's Jewelry Store was conducted with the other gang?

MR. LEWIS: May I respectfully submit that this is improper redirect. We've had it in direct examination, and to rehash what

we've had in redirect examination is not the province of redirect.

THE COURT: Yes, but, Mr. Lewis, as I explained, you understand the purpose of redirect examination, so I'm going to overrule your objection.

MR. LEWIS: All right, Judge.

BY MR. RYAN:

Q Will you tell us who you conducted the burglary of the Markel's Jewelers with, please?

A With Mr. Denisch, Beansy, Gaspipe, Junior and Joey Brewster.

Q Can you describe to us, briefly, the manner in which it was conducted?

A Yes, sir. We entered the premises through our roof, a hole that we made in the roof. At this time Mr. Denisch descended through the hole in the roof, circumvented the alarm system.

At this point Beansy, Gaspipe and Junior went down into this jewelry store and proceeded to burn open the safes that were located there. While we were in -- doing this, I stayed on the roof as a lookout. Mr. Denisch stayed in the store to monitor the equipment that he had hooked up to the alarm system.

Colloquy

THE COURT: I assume you will have no trouble with the FBI?

MR. RYAN: That is correct.

MR. KLEIN: I wanted to renew my motion for a Messiah motion at this time, and it seems to me that the choice of putting my defendant on the stand is being taken out of my hands because of the permitting of this conversation to go in.

THE COURT: You see, the subject has been opened up by other counsel, and it poses a problem. I cannot foreclose the Government from going into something so the Jury gets a complete picture of what occurred.

MR. KLEIN: We would have to go into the reasons for the call in the absence of counsel.

THE COURT: If it means giving you another opportunity to cross-examine Mr. Condon, I may consider that on the theory it wasn't brought out until after counsel, other counsel had gone into the subject.

If you wish to exercise that right, I may give it to you.

I don't believe there is a Messiah situation on the basis of the suppression hearing we had.

MR. KLEIN: I thought it was an act of discretion to put my client on the stand at this point and I will have to put him on even though I may have had some reservations of putting him on, and in that event he is being denied due process.

THE COURT: All I can say basically is you seem to be saying that because this man, this witness who claims to have been a co-conspirator and an accomplice, is testifying, and implicating your client, that the decision is being taken out of your hands.

MR. KLEIN: No. The fact that a meeting was held in this office, in this building, that was called by somebody in authority from the law enforcement division, and my man was brought down here in the absence of counsel, placed in a room with a cooperating Government witness and got into a conversation with him, and I didn't go into the conversation. Nobody did. The fact a meeting was held is what is bothering me.

THE COURT: Aside from the fact that the subject was opened up on cross-examination, what is your purpose here to bring out admissions?

MR. RYAN: His conduct was incriminatory. He didn't protest his innocence as implied in the questions on cross-examination.

He wasn't asked by Mr. Condon that he should falsely implicate the others. Those are the questions on cross and we intend to bring out what was said.

MR. KLEIN: There was an instruction by your Honor that questions of -- questions are not evidence. The man on the stand -- well, there is no proof of that, one way or the other.

THE COURT: Mr. Ryan is saying th subject was explored on cross-examination.

MR. RYAN: Correct.

THE COURT: I take it you believe it is a misleading impression?

MR. KLEIN: The witness said no. He denied every question I asked.

I asked him every question and every question had a nc answer, if you recall.

THE COURT: Let me see that cross-examination.

MR. NEWMAN: May I suggest that we do this a little early tomorrow morning, and that you hold

5

up on your ruling?

Maybe we can have Mr. Condon very briefly testify as to what he is going to testify in the absence of the Jury tomorrow morning?

THE COURT: All right.

MR. RYAN: Fine. Why don't we do it right now?

MR. NEWMAN: Because some of the defendants left.

MR. RYAN: Well, Mr. Bollella is the only one involved.

MR. NEWMAN: Would you say that in front of the Jury?

THE COURT: I think other counsel would have to be present. Find that portion of the transcript.

MR. RYAN: Here it is, page 1190 and 1016.

THE COURT: You see, Mr. Klein, the problem has been created by your decision. It all came up because you went into the business about England on page 1015, and then on page 1016 you started off asking, did you speak to Mr. Bollella after the arrest, and that is when Mr. Condon started to talk in response, and he answered yes, sir, and met with him; and then where did they meet, in this

building, and he denied he had anything to do with calling him down here; he thought it was done by an FBI agent. He knew he was represented by an attorney, and so forth.

MR. KLEIN: He denied everything.

THE COURT: He answered these questions.

MR. KLEIN: He denied them.

THE COURT: Had he already made this deal?

MR. KLEIN: As to the content of the conversation --

MR. NEWMAN: May we be excused, since this material in the record we have nothing to do with?

THE COURT: Yes.

Did you feel it would be part of your cooperation to talk to Mr. Bollella to try to convince him to be a Government witness -- well, he denied it.

You said, was it a little extra, and he said he thought he was doing him a favor.

Are you saying that Mr. Ryan here cannot go into what did occur?

MR. KLEIN: That is my impression.

THE COURT: He cannot?

MR. KLEIN: No, sir. Until we have a

Messiah hearing.

THE COURT: You elected to go into it. You opened the subject on cross-examination of this witness on the topic.

MR. KLEIN: I didn't ask him conversation, but just that, and he said no on the content.

THE COURT: Where was the other part?

MR. RYAN: On page 1190.

THE COURT: Mr. Lewis asks, didn't he tell you he was going to incriminate these defendants because he was innocent, and the answer is, no, sir, he did not.

Didn't he say he is going to take a plea because he was innocent, and the answer was, no, sir, he told me he would take something, and then it was cut off. I think there is a problem from the standpoint of not leaving the Jury with a misleading impression.

I am a little puzzled by your Messiah point. Your position seems to be very flatly that the Government could under no circumstances talk to him without his counsel being present.

MR. KLEIN: Unless there was an express waiver.

8

THE COURT: How about his waiving it?

MR. KLEIN: It has to be a knowledgeable waiver, and I say in acquiescence to superior authority, particularly when he got the calls, got the call and was told he was implicated by Condon, certainly is not an election to waive counsel.

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(Continued on next page.)

THE COURT: Well, let me -- Had Bollella been arrested up to that point?

MR. KLEIN: Yes.

THE COURT: So he knew he was already arrested for this crime?

MR. KLEIN: Yes, but his contention is he never even heard of the crime. That's what he's told me now, your Honor.

THE COURT: Let's put it this way: He knew he had been charged.

MR. KLEIN: Right, but he never knew that Condon had put him in the case. He couldn't understand that at all.

THE COURT: What you are saying is that this is the first time he was aware?

MR. KLEIN: One of the officers, Mr. Bollella tells me, and I -- I've been finding out as I went along, as I came in this case late -- Mr. Bollella told me one of the officers told him that they had Condon in their hip pocket and that Condon had put him in the case and was going to cooperate and that inasmuch as he was in the case he might as well come along and do the same thing. He'd only do himself some good.

THE COURT: But let me ask you this: Couldn't that actually be an incentive why he would want to come down and fine out? I mean, rather than being evidence of compulsion, it would be -- it might be viewed as a decision on his part whether with -- I don't know. We don't know yet whether he consulted with counsel. You weren't his counsel at the time.

MR. KLEIN: No, sir.

THE COURT: We don't know what his counsel said. Maybe his counsel said to him -- I am speculating. I don't say it did happen. His counsel could have said, "Go down there and find out what they have."

MR. KLEIN: He'll have to get on the stand and tell how he came into the building after he was -- after he was indicted or arrested, without counsel, and we have a collateral issue and we are intertwining -- we have a built-in Messiah hearing.

I think your Honor would then have to give a charge to the jury.

THE COURT: I will take a look at it overnight.

MR. KLEIN: If there is a taint and the

taint went across the board --

THE COURT: You see, here is the thing. I am aware of the fact that post-conspiracy declarations are generally considered not in furtherance of the conspiracy. But insofar as Bollella himself is concerned, whether we're talking about conspiracy or substantive crimes -- I think he's in at least one other count -- those could be admissions by him that were testified to.

So again it's the question of a limiting instruction.

They could be binding on him, if they are in fact admissions. I don't say they are; I'm not making any judgment on that.

But what I am trying to say is that you seem to be saying, really, that because he came down without counsel, that requires a Messiah hearing

MR. KLEIN: Well, I say that the facts and circumstances under which he came down without counsel when he got the call --

THE COURT: But we have explored those.

MR. KLEIN: We didn't go into it fully, your Honor.

THE COURT: Well, you -- Berry was on the stand.

MR. KLEIN: That's only Berry.

THE COURT: He was the law enforcement officer there, other than Schlam.

MR. KLEIN: Look where this is taking us. Mr. Ryan probably knows. A week before he came here he got a telephone call from a Mr. -- a message from Mrs. Condon, the mother of the witness. She said, "My son wanted you to see me." He came over the house. Apparently the house was under surveillance or something, and the next thing he knew agents broke in and roughed him up and accused him of threatening her, and she said "That's not so, absolutely not so."

He got a call from Mr. Berry at the time, and that's when Mr. Berry told him, "Listen, stay away from her, but we have this fellow in our hip pocket. He put you in the case. You do yourself some good. Come on down here without an attorney."

A week later he got the call again from Mr. Berry. "Are you going to come down? Only do yourself good here."

And he all week was in a panic as to what

5

happened there. He came down and I think -- we are going to have all that in front of the jury, your Honor. That's going to come out. We are going to decide the case on the collateral issue.

It's a case of the tail wagging the dog. They're liable to pay more attention to this post-indictment situation than the case, which by now is boring and they've forgotten it already. It's nothing new.

THE COURT: It will liven up again when Mr. Denisch gets on.

MR. KLEIN: Then it will tail off again. It usually happens.

But I'm afraid that --

THE COURT: I get your point and your concern, and I will have to think about it and see if I can find anything that -- by way of law which will guide me.

As I say, it might in -- in retrospect, it might have been better if we settled all this before the trial began, and I frankly was surprised when you didn't put Mr. Bollella on.

MR. KLEIN: I didn't know enough about it. I caught this piecemeal. I met this man once in

his attorney's office for a moment. Then I left. I met him again here in court.

While I was standing here he told me that he met -- I didn't even go into the full facts with him. He told me that he had met with agents in this building after he was arrested. That's all I knew at the time.

Afterwards and during -- Since then I've been discussing with him. Now I find out other -- the other things that I've told you about. I wasn't aware of them at the time.

And if I had been, perhaps I would have put him on the stand at that point to bring it out. I didn't know all these things.

THE COURT: Is it a fact -- and I won't try to -- you don't have to answer, but you might. Was he represented by counsel at the time he came down here two weeks after his -- Do you know? You can find that out.

MR. KLEIN: I don't know. I know there was a notice of appearance by Mr. Newman, which was an accommodation.

THE COURT: Which was only an accommodation.

MR. KLEIN: An accommodation.

Then I see a letter in the file which was dated --

THE COURT: In the court file?

MR. KLEIN: Subsequent to that. No, in the file I got from Mr. LaVelle, which apparently was dated August 2nd or the 28th. It might have been dated after -- forwarding a notice of appearance or notifying the U.S. Attorney that he was putting a notice of appearance in.

My guess -- and it's only a guess, please don't hold me to it,your Honor -- my impression at this time is that this meeting, if it occurred in July, occurred in between the time Mr. LaVelle filed his notice of appearance and --

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THE COURT: So you can't even be sure he was in fact represented by counsel at this time.

MR. KLEIN: Doesn't your Honor hold Mr. Newman in until a substitution comes in?

THE COURT: Mr. Newman, my recollection is, though I don't know that I have them -- made any notes at the time. We have to go back to the actual minutes of the arraignment. But I thought that Mr. Newman made a very qualified appearance.

MR. KLEIN: Yes, he did. Mr. LaVelle may

come in and testify. I don't know. I haven't seen him since. He may come in and testify he was hired the next day or so and didn't file his appearance until later. Sometimes you have to make arrangements for fee or otherwise. He could have been represented by counsel. I don't know, your Honor. I would have to bring Mr. LaVelle in to testify.

THE COURT: Why don't you review the docket sheet? It must be downstairs somewhere. I don't know.

MR. KLEIN: There is continuous representation by counsel in the docket sheet because Mr. Newman was on it until Mr. LaVelle filed his. But supposing Mr. LaVelle comes in and says, "I was retained and I didn't file a notice of retainer until"-- there is no -- the burden is to show a cessation of representation.

But that's no grounds for anybody to jump in and take advantage as if the man never had an attorney.

THE COURT: Well, I mean, we are dealing with what are the facts.

MR. KLEIN: All right. That's why I'm asking

if we have a hearing in the absence of the jury, I'll develop the facts, your Honor.

THE COURT: Yes, but I would think that part of those facts would be developing the fact of actual representation at various preliminary meetings.

As I say, I do recall, I have a distinct recollection of Mr. Newman appearing. I think only on the original arraignment and making a very limited representation.

MR. KLEIN: That's what he said here.

THE COURT: And it was indicated that Mr. Bollella was going to get counsel. Now, when he got it, only he could answer.

MR. KLEIN: During that period of time, he should be protected and should be entitled to the protection.

THE COURT: But he had indicated he was going to get counsel so there was no basis for the Court -- I think what I did was simply accept a not guilty plea on his behalf. I don't even know wkether --

MR. KLEIN: I am not finding fault with the Court, no, sir. There is no finding fault

with the Court. If your Honor understood that, then it is my fault for giving an erroneous impression.

THE COURT: No, I am not taking offense at that, I assure you. I am just trying to reconstruct my own rather hazy recollection that I don't even recall what happened with respect to bail arrangements, whether that was even handled by Newman or was left open, and there may have been a later time when somebody representing Mr. Bollella came back and spoke on that subject. I just don't remember that.

MR. KLEIN: Bob,do you remember when you spoke to Mr. LaVelle after the arraignment?

THE DEFENDANT BOLLELLA: It was Wednesday we were arrested; it was the following Monday that I had spoken to him and retained Mr. LaVelle.

MR. KLEIN: Was that before you came down here to speak?

THE DEFENDANT BOLLELLA: Yes. Well in advance.

THE COURT: In other words, Mr. Newman was here for you on one occasion?

THE DEFENDANT BOLLELLA: Right. At the time

we were arraigned he put an appearance representing me and entered a not guilty plea.

THE COURT: That is what I recall. But it was a limited appearance and it was just I think a plea of not guilty entered on your behalf.

THE DEFENDANT BOLLELLA: And also bail arrangements.

THE COURT: Did he handle the bail for everybody?

THE DEFENDANT BOLLELLA: Yes, at the same time.

THE COURT: I see. I think there was an indication you were going to get your own counsel.

THE DEFENDANT BOLLELLA: Right, which I did the following Monday.

MR. KLEIN: From Wednesday to Monday?

THE DEFENDANT BOLLELLA: Yes.

THE COURT: Which would have been July again?

THE DEFENDANT BOLLELLA: July 19th was a Wednesday. About the 26th. Approximately the 23rd.

MR. KLEIN: 23rd, 23rd.

THE DEFENDANT BOLLELLA: 23rd.

THE COURT: Well, I don't know what more

I can say now. I will just have to take a look and see.

MR. RYAN: One thing I'd like your Honor to consider is the opening statement, page 269 of the record, by Mr. Lewis on this matter. 269.

MR. KLEIN: That's Mr. Lewis, and he didn't represent Mr. Bollella. I recall that, Mr. Ryan.

MR. RYAN: I assume he made the opening statement based on some information from you or your client.

MR. KLEIN: No, sir; Mr. Lewis does his own thing.

MR. RYAN: Do you want me to read it to your Honor?

THE COURT: No, I have it here; I have it here. What was that other section, eleven something?

DETECTIVE ROSA: 1016 and 1190.

THE COURT: 1190?

DETECTIVE ROSA: Yes.

THE COURT: Wait, I have 1190. The other one was 1016, right?

MR. RYAN: Correct.

MR. KLEIN: Yes, sir.

THE COURT: That's this one.

MR. KLEIN: I'm in a different position than the other defendants, your Honor, and I don't want to be out-voted or compromised by them because they will say as long as you give a limiting instruction it's not binding on us. That doesn't help me, though.

THE COURT: No, I can understand that.

MR. KLEIN: Mr. Ryan, what page was Lewis's opening, do you remember?

THE COURT: Well, I will just have to take a look and see what we can come up with.

MR. KLEIN: O.K. Good night, your Honor. Thanks for staying.

THE COURT: Good night.

(Whereupon, a recess was taken until July 19, 1973, at 10:00 o'clock a.m.)

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in there with two armed guards to keep it safe and we went down to collect it at the bottom. Sonny had mentioned that Dennis shouldn't get anything.

Q What else did he say about the burglary?

A Well, we were just talking until we got it all counted.

Q And how did you count it, do you recall?

A Each person had a pencil and paper and whatever bag he would count it, he would stack it in ten, five and fifty cents, and with all the checks and deposit receipts in the middle.

We put all the burnt money -- there was some burnt money.

Q What can you do with that?

A We put that on one side along with the money that was wet and we put all the ones to one side. And Lou said, "Don't worry, me and Bollella will share that."

I said I didn't want any of the wet or burnt money and Lou said, "Don't worry. I will take that."

Q Who said that?

A Lou.

Q What else did you do in connection with counting the money? Tell us how you came to the count.

A After each person had counted up what he had, we

added it all up and see what it came to, and we divided it by the number of guys that were there and it worked out to about fourteen thousand a piece.

Q Was that true for Lou Montello?

A Right. He got a half a share, Bollella was to get another half. They were splitting a share between them.

Q Was anything else discussed at this house about that, if you recall?

A None, until I was ready to leave.

Q What was said at that time?

A It was about 8:00 o'clock in the morning when we got everything done. Lou folded the sheet up with all the money bags, deposit slips, and he said, "Don't worry. I will burn all this and get rid of it," and Sonny said, "It's not a good idea for me to carry something like $30,000 with me."

There was one other thing that I forgot.

Q What was it?

A In the conversation, Sonny said that this fourteen thousand wouldn't even cover his lawyer's fees.

Q What else was discussed?

A I offered to lend him my share.

Q What else was discussed?

6 Denisch - direct

A When he said Dennis shouldn't get anything -- I don't know who said what, but it was agreed that Dennis would get his share but he was out. He wouldn't come on any more jobs. So when I was ready to leave, to take my share, Sonny said it was not a good idea to carry that much money.

Q Did he tell you why?

A "Because you work for the company and if you get stopped how could you explain that much money on you," that I should leave the money with Lou and Lou would give it to Bollella.

MR. KLEIN: I request a limiting instruction not binding on Bollela. Not present

THE COURT: That's right, ladies and gentlemen, until such time as you receive the Court's final instructions, you must bear in mind, as I said, that conversations are only to be considered by you at this stage where the other person is present. Do you understand? When the statement that is atrributed to him is made.

MR. RYAN: Would you read back that answer, Mr. Reporter?

(Answer read.)

MR. KLEIN: I would say 20 more minutes.

MR. HOCHHEISER: Could I just step out and Mr. Lewis will take over for me.

MR. LEWIS: I will be glad to.

THE COURT: Yes, go ahead.

Proceed, Mr. Klein.

BY MR. KLEIN:

Q Did you receive any share of the loot of the Manufacturers Hanover burglary from anyone else but Mr. Bollella?

A No.

Q May I ask the number of this handwritten document?

MR. RYAN: That is Court Exhibit 11.

Q In this Court Exhibit 11 that is your handwriting; is that right?

A Yes.

Q This was made over the weekend?

A Yes.

Q This past weekend?

A Yes.

Q Did you put this statement in your own handwriting, referring to page 9-B, referring to a conversation you had with Mr. Salvatore Montello: "He suggested I leave

it with Lou and just take a few thousand for now and Lou would give the rest to Bollella who would in turn give it to me and Dennis as we needed it. I thought it was a good idea."

Do you recall making that statement in here?

A Yes, that is true.

Q Did you take a few with you then?

A Yes.

Q A few is three?

A Two.

Q What is a couple?

A Two.

MR. RYAN: I object.

THE WITNESS: I took a thousand for me and a thousand for Dennis.

Q How much did you receive from your share of the loot from the Manufacturers Hanover?

A 7,000 or 8,000.

Q How much?

A 7- or 8,000.

Q Do you recall being interviewed by Agent George Small?

A Yes.

Q On July 11, 1972?

been having marital affairs since 1971. I want to ask him whether he is using any of these moneys for these marital affairs.

THE COURT: I am not going to permit you to go into that.

MR. LEWIS: I except to that.

THE COURT: I don't believe that is proper cross-examination.

MR. LEWIS: I don't believe it is proper for the government to give him money to have a good time.

(In the hearing of the jury.)

CONTINUED CROSS EXAMINATION

BY MR. NEWMAN:

Q Out of the moneys you received out of the Chase Manhattan job in April, you gave $5,000 away, didn't you?

A I did.

Q Didn't you give it to Dennis Condon?

A No.

Q You were asked by Mr. Klein on cross-examination certain questions about being arrested in July of 1972. Do you recall that, sir?

A Correct.

MR. SONENSHINE: Objection. Irrelevant.

BY MR. RYAN:

Q Do you recall Mr. Newman asking you whether you gave $5000 from the Chase Manhattan Bank burglary to Dennis Condon?

A Yes.

Q Did you give him $5000?

A No.

Q Whom did you give it to?

A Bollella.

Q And did you have a conversation with him when you gave him the $5000?

A Yes.

MR. KLEIN: I object to this as not proper redirect, your Honor. I ask that both these answers be stricken. No such conversation on direct testimony. Nobody brought anything out on cross-examination like this. Opening a brand new subject. New accusation here.

THE COURT: Does this relate to cross-examination, Mr. Ryan.

I must confess, I don't recall.

MR. RYAN: Your Honor, Mr. Klein --

THE COURT: You'd better come up to the

A I gave him the 5000. I told him that I committed the burglary.

Q You had a further discussion?

A Yes.

Q All right.

MR. NEWMAN: May we have an admonition that this is not binding on anybody else, considering the date and that no one else is present?

THE COURT: Considering the date? I understood this to be a week after the burglary.

MR. NEWMAN: The April burglary.

THE COURT: I see what you mean.

MR. RYAN: April 28.

THE COURT: Yes. Yes.

All right. Ladies and gentlemen, as I think I have instructed you several times before, but I think it's important that you should try to bear in mind, must try to bear in mind, that conversations of this kind between the witness and a particular defendant may only be received and considered by you at this juncture, unless I instruct you otherwise at some point, as against the particular defendant who is in the conversation, face to face with this witness.

THE COURT: I will sustain an objection to that, Mr. Hochheiser. I think you are going beyond the bounds of recross here.

Q This doctor that you told you lost your memory, did you also tell him that you perceived dangers and threats and things like that?

A That I --

Q That you perceived dangers and threats?

A No, not that I can recall.

Q The only thing you told him that was false was that your memory was bad; is that right?

A Yes, as far as I can remember.

MR. HOCHHEISER: I have no further questions.

BY MR. KLEIN:

Q You told us a few moments ago that sometime in April, I believe, after the Chase Manhattan burglary you gave the sum of $5,000 -- which was earmarked to Condon -- you gave to Bollella?

A I don't understand --

MR. RYAN: Objection.

MR. KLEIN: I will rephrase it.

Q Did you testify a few moments ago on redirect examination when Mr. Ryan asked you what you did with

$5,000 of the proceeds of the Chase Manhattan Bank --

A Yes.

Q Did you testify you gave it to Bollella?

A I did.

Q You know -- did you tell that to the FBI agents when they made those reports?

A I did.

Q Do you know whether or not that appears in any of those reports?

A No.

Q You know it doesn't appear?

A I don't know.

MR. KLEIN: May I have all the reports, please.

Q Did you testify to that in the Grand Jury?

A I wasn't asked.

Q Who questioned you in the Grand Jury?

A Mr. Schlam.

Q Before Mr. Schlam questioned you in the Grand Jury, had you gone over the facts in the case with Mr. Schlam and with members of the FBI several times?

A Yes.

Q And you discussed this case in narrative form; is that right?

A He said he was going into it in substance, yes.

Q I understand that Mr. Schlam after gathering that information from you directly or the FBI agents, then asked you the questions that were propounded to you in the Grand Jury; is that correct?

A Correct.

Q Isn't it -- you didn't tell us this on direct when you first testified?

A No.

Q Isn't this the first time in any court in this land under oath that you made that statement that in April you gave $5,000 of the proceeds of this other bank burglary to Mr. Bollella?

A I think I mentioned it in the other trial.

MR. KLEIN: May I have a moment, your Honor.

THE COURT: Moments are precious, Mr. Klein.

Q Before testifying here, did you speak to Mr. Ryan today?

A Yes.

Q Have you ever received full payment of what you claim is your share of the Manufacturers Hanover burglary?

A No.

Q You say the payments were to be made by Mr. Bollella?

A Yes.

Q So the time you claim you gave him $5,000 from the proceeds of the Chase Manhattan Bank burglary in April, Mr. Bollella owed you more money than $5,000 from the proceeds of the Chase Manhattan?

A He didn't personally owe me the money, no.

Q But there was money coming through him in excess of $5,000; is that correct?

A Correct.

MR. NEWMAN: Would your Honor have any objection, not to delay, that I start my recross examination and then Mr. Klein would have an opportunity to find what he is looking for?

THE COURT: Any objection?

MR. RYAN: No.

THE COURT: Go ahead.

BY MR. NEWMAN:

Q Now, you told us, sir, that you told a story or you told Mr. Ryan that you told a story to a psychiatrist in Topeka, Kansas and you lied to him; is that right, sir?

A Yes.

in the custody of the Court to be available to counsel if they are needed.

MR. RYAN: My only impression is that right now we are a bit presumptuous.

THE COURT: No, I don't mean to be presumptuous.

MR. RYAN: I know. I am addressing myself to the prospect that it may be necessary and this is as good a time as any, since the subject has come up, to make sure that Exhibits are accounted for. They should, in my opinion -- I guess they are inventoried on your list.

THE CLERK: Yes.

THE COURT: And kept in the file. And if they need to be placed in a sealed folder, or anything like that -- I don't know that they have to be sealed, but in a separate folder for exhibits to be available under the surveillance of the Clerk.

MR. KLEIN: May I address myself to the introduction of the alleged payment of the five thousand dollars from the -- my contention is that it's not proof of prior similar acts. It's a subsequent act, far removed and beyond the scope of the conspiracy, having nothing to do with this crime

whatsoever. It deals with proceeds of another bank burglary, your Honor. And it's bad proof in the case, nothing to do with it, not germane, completely immaterial and prejudicial to my client.

And may I ask that it be stricken?

THE COURT: Well, the problem that I have with your application is that --

MR. KLEIN: I objected at the time.

THE COURT: On cross examination, a number of counsel -- I don't know who now. There were so many who did go into the question of what happened to the so-called proceeds of bank robberies, that the Government witness Denisch admitted to -- and there was a strong suggestion that he may well be holding out other large sums and so forth. So the Government's purpose was to show what happened to -- what he claimed he had --

MR. KLEIN: But they violated my client's rights here. They have proof of another crime.

THE COURT: I think it would be admissible as against your client on state of mind, intent, his association with this defendant.

MR. RYAN: Relationship.

MR. KLEIN: Because the money was paid over--

THE COURT: All right. Do you know where it is?

MR. RYAN: It should be with the Court.

(Mr. Klein passed the exhibit among the jurors.)

CONTINUED DIRECT EXAMINATION

BY MR. KLEIN:

Q Mr. Bollella, yesterday you denied a number of statements that Condon and Denisch had made, and I think I may have missed one or two.

Did you ever receive any share of burglary loot from the Manufacturers Hanover or any other bank?

A No, I never did.

Q You heard Mr. Condon state that he was present at Monte's and told you that he had asked Sonny for a thousand dollar loan and he said that you told him he shouldn't have done it; did you ever have such a conversation?

A No, the meeting never took place.

Q Did you ever notice whether Condon or Denisch gave any sudden -- any display of sudden wealth?

A No, not to my -- (the witness coughed). Excuse me. Not to my knowledge.

Q Do you recall when you were arrested?

A Yes, July 19, 1972.

BY MR. KLEIN:

Q Did you ride in a car the day of your arrest -- did you ride in a car with Detective Rooney?

A Yes, I did.

Q Where were you going ?

A To the FBI headquarters at 201 East 69th Street, here in Manhattan.

Q Where were you coming from?

A From my apartment.

Q You were under arrest?

A Correct.

Q Did you have a conversation with Officer Rooney in the car?

A Yes, I did -- well, he started the conversation --

Q What did he say?

A He told me that he had a message, a special message for me from Assistant United States Attorney Peter Schlam, and the gist of the message was, as I recall, that as a police officer I don't -- you don't belong with these people, you are a nice guy, have a very good reputation, help us, get on our team and we can assure you that you will never see the inside of a jail cell.

Q Did you tell him anything, did you say anything to him?

A I said I still didn't understand what I was being charged with or under what circumstances I was being arrested.

Q And now then, did you have a conversation with the FBI with another law enforcement officer, Mr. Berry?

A I met Mr. Berry at the FBI building and --

MR. KLEIN: I ask if Mr. Berry is in Court, I saw him earlier.

MR. RYAN: No, he is not.

Q Did you have a conversation with Mr. Berry at the FBI building?

A With Mr. Berry and Special Agent Small who were at my apartment when I was arrested or who arrested me.

Q Is Mr. Berry a Special Agent?

A Yes.

Q What did Mr. Berry say?

MR.RYAN: Just a moment; where did that conversation take place?

THE WITNESS: At the FBI building in Manhattan.

Q What was that conversation?

A Specifically Agent Small, who was Mr. Berry's partner, told me that Peter Schlam, the United States Attorney whom they referred to in the car, Detective Rooney had spoken about in the car, wanted to talk to me, would I be willing

to talk to Mr. Schlam over the telephone.

So I said, "Yes, of course." I wanted to get more information as to what this was all about --

Q And then did -- did they put in a call for you to Mr. Schlam?

A Yes. Well, the telephone -- I was told that Mr. Schlam was on the telephone and he wanted to talk to me.

Q Did you have a conversation with this Mr. Schlam?

A Yes, I did.

Q And he was the Assistant United States Attorney in charge of this case?

A Right.

Q What did he say to you and what did you say to him?

A He told me that, "Bob, you are a police officer, you have an excellent reputation, you don't belong with these other people that you were arrested with," and he can insure that I would receive a suspended sentence if I gave them full cooperation and he put these other people in jail where they belonged, so he said.

(Continued on next page.)

DIRECT EXAMINATION

BY MR. KLEIN (Cont'd):

Q In other words, you could have gotten the same deal as Denisch and Condon if you got on the stand and testified the way they did?

A That's correct -- according to Mr. Schlam, yes.

Q Did you accept that offer?

A I asked Mr. Schlam -- after he stated it, I said, "Mr. Schlam, would you please tell me what this is all about? What I'm being charged and under what circumstances, how am I being arrested?"

He said, "You know what it's all about. You conspired with these other people to burglarize the Manufacturers Hanover Trust on Northern Boulevard and that you were implicated -- Denisch implicated you into it and the only way you could help yourself is to testify for the Government; in, return the Government would make sure that youwill never see the inside of a jail cell."

Q What did you say to him?

A I said, "At this point my head is in such confusion and everything, I can't even say anything except I don't know what it's all about and I have to wait and see when I get an attorney before I can talk to you any more."

Q He called you; is that right?

A That's correct.

Q And you were advised by Special Agent Small that he wanted to talk to you?

A I was told by Agent Small that Mr. Schlam wanted to talk to me and would I consent to talk to him which I said that I would.

Q Did he ask you if you had been advised of your Miranda rights?

A Who is that?

Q Schlam.

A No. The topic was not part of the conversation at all.

Q Did you tell him that you had been advised of your Miranda rights?

A The topic did not come up at all.

Q Did you ever make a statement to him that the advice was unnecessary because you were a policeman and you knew what your rights were?

A No, never said that.

Q Did you ever ask him what he would be willing to offer you in return for your cooperation?

A No.

Q Did he ever tell you that you would have to plead guilty to one count of the indictment?

A Not specifically. I recall him saying that you could get consideration -- you would get a suspended sentence -- it wasn't clear to what counts I would have to plead guilty to. He just specifically -- "We can make sure that you would get a suspended sentence."

Q Now, do you recall the date that you were arraigned?

A It was the same date -- about 4:00 o'clock in the afternoon of July 19th.

Q Did an attorney appear for you at the arraignment?

A Yes.

Q And you pleaded not guilty?

A Correct.

Q And you were held in bail?

A Yes.

Q And then -- who was that attorney?

A Mr. Gustave Newman who is sitting at the defense table.

Q Mr. Newman did this as an accomodation until you could retain counsel of your own choice?

A Correct.

Q Then did you then retain counsel of your own choice?

A Yes.

Q What's the name of that lawyer?

A Mr. Raymond G. LaVelle.

Q Where is his office located?

A No. 1 East Old Country Road, Carl Place, Long Island, New York.

Q Do you know if Mr. LaVelle communicated that fact to the U. S. attorney's office?

A Yes.

MR. RYAN: Objection, unless he was present.

Q Were you there when he called?

A No, I was not.

Q Did Mr. LaVelle tell you that he called?

A Yes, he stated --

MR. RYAN: Objection.

MR. KLEIN: We have a statement on the question of possible waiver. He was represented by counsel at all times.

MR. RYAN: We don't have the date, number one, and number two, I object to --

THE COURT: On the basis that it is not being offered to prove the truth of what occurred but merely the state of this witness's mind with respect to whatever after that happened, I will

permit it.

I do think that you ought to bring out some details as to the time and so forth.

BY MR. KLEIN:

Q How long after you were indicted did you go to see Mr. LaVelle?

A I called him two days after I was arrested which would be the 21st. I made an appointment for the following Monday which would have been about the 24th of July.

Q Then did you see him?

A Yes, at his office at Carl Place, Long Island.

Q Then did you see him again after that -- did you retain him?

A At that point I did.

Q To represent you in this case?

A Yes.

Q Did you see him again after that?

A Yes, I saw him towards the end of that week or the following week.

Q Did you pay him some money as a retainer?

A Yes.

Q Do you know whether or not he then -- is it your knowledge that he filed a notice of retainer in place

of Mr. Newman?

A Correct.

Q At all times it was your understanding that you were represented by counsel?

A From the time I first visited him that Monday and he stated that he would accept the case and if any law enforcement officers would get in touch with me, he was my attorney and if I had any questions not to fail to call him.

MR. KLEIN: May I ask for docket entries indicating -- I may have it here.

Mr. Ryan, do you have a copy of the docket entries indicating the notice of appearance by Mr. Newman and also by Mr. LaVelle --

NC fols.

(Continued on next page.)

DIRECT EXAMINATION

BY MR. KLEIN: (Cont.)

MR. NEWMAN: I never filed a notice. Your Honor asked me if I would appear because it was late in the day.

THE COURT: That's correct. If you wish me to I will instruct the Clerk to have the docket sheet brought up.

MR. KLEIN: Together with the notice of appearance from Mr. LaVelle.

MR. LEWIS: That sould be in the file.

THE COURT: Call the Clerk and get the file.

MR. RYAN: Counsel has a copy and I am willing to look at it to save time.

(Document handed to counsel.)

THE COURT: Is it complete?

MR. RYAN: No, it is not. This was a superseding matter.

MR. KLEIN: Mr. LaVelle gave me an unsigned copy of what appears to be a notice of appearance.

MR. RYAN: I recognize that.

BY MR. KLEIN:

Q Do you recall receiving a telephone call from

either Agent Small or Agent Berry two or three weeks later?

A Yes, I do.

Q Who called you?

A The first one on the phone was Special Agent Small and I recognized the voice. He told me that, "A couple of weeks ago we really could have used your help -- without you the case could have been lost. Now, we have Dennis Condon in our hip pocket. We don't need you any longer.

"If you want to help yourself, join the team and you could save yourself a lot of time in jail. You are a cop, you don't belong in jail."

Q What was that on the phone?

A Special Agent Small.

Q What did you say?

A I was amazed. I said, "If you have Dennis cooperating with you, I am sure he told you the truth that I am not involved and I know nothing of this."

He said, "That's not what Dennis says. He puts you right in the middle of it."

And I said I couldn't believe it.

Q Thereafter, did you contact your attorney?

A During the same conversation Agent Berry also got to the phone -- apparently it was an extension and he said basically the same thing: Youare a copy, you have a good

family, you don't belong to this mess -- save yourself, we don't need you but you could help yourself -- you could do a lot more to help yourself than you could -- would be to us -- come on down, join the team.

I said I couldn't do it, it's impossible -- he said, "If you want to get in touch with us you know where we are at, leave a message and we will get back to you."

I ended the conversation at that point -- I said I couldn't do it and ended the conversation.

Q Did you communicate with your attorney after that?

A Immedidately afterwards, I called my lawyer's office--

Q Who is that, Mr. LaVelle?

A Yes, and I explained to him the gist of the conversation I had with the two FBI agents -- he asked me, "Dennis is a friend of yours. Would it be possible for him to do something like that to put you in the middle of it?"

I said,"Impossible, we are good friends, I never had anything to do with it," and I said, "I am sure he woudln't use me to buy himself out of it."

I didn't think he would do it to me.

Q Did he give you any advice?

A He told me if they did call again just that he would listen to what they have to say.

Q Did you get another call from either Special Agent Berry or Small?

A Yes.

Q Yes?

A After the weekend -- I believe that was Friday afternoon. On a Tuesday morning I got a call from Special Agent Berry.

MR. RYAN: Excuse me, could we have the date, please, if possible?

THE WITNESS: I would say the first call came approximately two weeks after I was arrested--two, two and a half weeks and the second call came about four or five days thereafter.

BY MR. KLEIN:

Q You were arrested on July 19?

A 19.

Q So this would be sometime around the end of July, beginning of August, somewheres?

A I would say the beginning of August.

Q Beginning of August?

A Correct.

Q All right, you say you got another call from Agent Berry?

A Right, on a Tuesday -- I believe it was a Tuesday

morning about four days after the first call and Agent Berry said, "This is Agent Berry, this is Dick Berry. How are you doing? Listen, we got Dennis Condon out here -- you want to talk to him? Why don't you come down? You are facing a lot of time over here, Bob. You are a smart guy, you ought to know to pick the right team. Dennis will only be here for a short time so you better hustle on down here."

Q Did he tell youto bring anyone with you?

A No, he said, "Hurry up, come down by yourself -- you know where we are at, at the U. S. Attorney's Office in this building."

Q When you got the first call from both Agents Berry and Small, were you upset?

A Yes.

Q Were you still upset when you got the second call?

A The second call shook me up more than the first call. The first call I didn't believe that Dennis would implicate me in this particular mess.

"The man happens to be here for a short while, come down."

(Continued next page.)

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Q Did you panic?

A Yes, I ran right down. I couldn't believe that this was happening, that this man would put me into this thing.

Q Where did you come to?

A The United States Attorney's office in this building. I believe on the fifth floor.

Q Who did you see?

A When I first walked in I saw Assistant United States Attorney Peter Schlam and --

Q Did he greet you?

A He just said hello and I said hello, and he passed me by and walked out of the office.

Q Then who did you see?

A Then I saw Special Agent Berry.

Q Did Agent Berry do anything about your person?

A Yes, he said that Dennis was in the next roo from where we were and he frisked me, and frisked me in a funny manner.

Q You are familiar with frisking?

A Yes, sir.

Q It's a search for weapons?

A Yes.

Q And there are certain procedures?

A Yes, pat down the sides, the body, the groin area, the sides of the legs.

Q Did Agent Berry go beyond the normal frisk?

A In addition to the normal area for search of weapons, he also patted my chest area, the back of my neck and the small of my back from the top of the neck to the small of the back.

Q Did you call this to his attention?

A I said "What are you doing this for?", so he turned around and says "Well, you never can be sure."

I believe I said, "What are you looking for, a miniphone"--which is a small recording device -- and he turned around, "Well, we can't be too careful."

Q What happened after he frisked you -- did he find anything when he frisked you?

A No.

Q What happened after he frisked you?

A He brought me into a small room adjacent to the office that we were in. I saw Dennis Condon sitting at his desk with his feet up on the desk.

Q Let me take you back a moment.

In coming down to this building, in response to the two telephone calls that you got from Agent Small and Berry--and Agent Berry, did you ever intend to waive the presence of your attorney?

A No.

Q When you came, did you feel it was a threat to you?

A He told me I was facing twenty years, and I'd better get down here -- Dennis will only be here for a little while to talk to him.

Q Where is your attorney's office?

A Carle Place, right near Mineola in Nassau County.

Q What happened after you were frisked?

A He took me into the smaller office, in which I saw Dennis Condon leaning back in a swivel chair with his feet on the desk. I entered the room and said "Hello, Dennis, how are you"?

And he turned around, put his elbows on the desk and said, "Hello, sweetheart."

Q Where was Agent Berry?

A Right behind me.

Q What conversation took place at that time?

A It was a very small room, and Agent Berry said, "If you want to talk here, fine, if you don't, we can go across the hallway, there is a larger room -- a conference room, where you would be more comfortable."

Q You went across the hall to the larger room?

A Correct.

Q Who was in the room?

A The room was empty. Myself, Dennis Condon and Agent Berry entered.

Q Was there a conversation that took place in the room?

A Agent Berry excused himself, went out and closed the door and Dennis started talking to me -- correction, I started the conversation with Dennis.

Q What did you say and what did he say?

A I asked Dennis -- I said, "Dennis, what is this all about? Do you know anything about this?"

So he says, "Well, I'm in a jackpot -- I'm in over my head."

I said, "Dennis, are you involved with banks as they say you are"?

He said, "Yes, me and Bobby Denisch teamed up. We thought we had a sure thing and it fizzled."

I said, "Dennis, you know better than anybody else that I had no knowledge of this and I had nothing to do with this. Why are you implicating me in this?"

He said, "Well, the United States Attorney got me over a barrel, and as you know" -- he said, "I never filed an income tax from the time I started working up until now. They are holding that over my head and several other matters that I was involved with. If I don't cooperate and don't do what they

tell me to do, I'm going to go away for a long, long time and I don't like to go away."

Q What else was said?

A So I turned around and I said, "Dennis, how could you involve me and use me to get you out of your problems? What did I ever do to deserve this? I was the only one that ever loaned you money when you needed money, the only one I ever loaned my car to, and even when you were stuck in England and you had no other recourse, you called me and asked me to bail you out, and I sent you a money order for three hundred dollars. What did I ever do to you that you should do this to me?"

He said, "Don't take it personally, some things happen the way they happen. I'm in a jackpot, and I have to do what the Government tells me to do."

So I turned around to him and said, "Dennis, you even admitted to Ellen that I had nothing to do with it -- you an Bobby Denisch were involved with this -- I had nothing to do with it. I had no knowledge of it and anybody that knows me knows I wouldn't be involved with it, if I thought it was illegal or any shenanigans going on. Youknow my reputation and the people I work with think of me, and how I operate."

He said, "I know that, but I'm in a jackpot, and I ne all the help they can give me. I don't want to go to jail,

I have a lot of things hanging over my head."

So I turned around to him and I says, "Now, Dennis, again I repeat to you, you said to Ellen -- who you think a lot of -- you know it to be a fact -- if and when I go to trial, she will testify to that effect, and I know the people I work with will come forward and tell the Judge and jury what kind of person I am, and I couldn't get involved with something of this nature."

He said, "Well, the Government feels they think they have a good case with me and Bobby Denisch, but if you came along and joined the team, there would be no doubt of the outcome that everybody else would go to jail for a long period of time, and that's the aim of the ballgame. Get on the team with us now, or I'll have to testify against you."

At that point, he said that he had not yet testified in front of the Grand Jury, so that it was depending on our conversation, what he would testify to, whether he would put me into it or not. So I told him I was dumbfounded, that a friend who I pal'd around with for the last couple of years, who I helped out, would turn around and use me to get out of his problems, as a scapegoat.

I said, "Dennis, you know I had nothing to do with it."

He leaned back, "I can't help myself, -- don't take it

personal, I just have to help myself."

Q Did you tell him whether you would testify or could testify?

A I said, "Certainly, Dennis, I can't implicate anyone that I know for a fact had nothing to do with it. I know I had nothing to do with it and I am going to go to court and testify and let the chips fall where they may."

Q Did there come a time that day, when Agent Berry came back into the conversation?

A Yes, I believe one time he came into the room during our conversation -- he called Dennis Condon outside of the room, spoke to him for a -- briefly -- a minute or two, and Dennis came back into the room and sat down and resumed the conversation.

Then, a little later, I asked Agent Berry -- Agent Berr came back into the room and I asked if I could be excused -- matters of personal necessity. I went out of the room, went to the bathroom, came back and Agent Berry sat for the duratio of the conversation, which lasted maybe another fifteen, twent minutes.

Q Did Agent Berry say anything to you?

A He joined in with Dennis, because "the Government is a big ball team, they have a lot of money and they could help you out. It's foolish to go against the tide. With both

witnesses testifying, I would think as well as the other defendants", and it was their opinion it was needless on my part -- of all the people I should cooperate with the Government according to my background.

I turned to Special Agent Berry that I couldn't do it. I knew it was a lie and I couldn't testify against people and implicate myself to just help the Government out.

(Continued on next page.)

Q During the conversation with Condon, did he indicate that he was working on behalf of the Government at that time as a Government agent?

A He said at that time he was arrested, he thought about it in the cells downstairs and he had a conversation on the day he was arrested with Mr. Schlam and indicated that he wanted to co-operate.

Q Did he indicate to you that it was part of his bargain to try and convince you to testify for the Government in the same manner he was testifying?

A Yes, he went further and said it was his idea to call me down and he told Mr. Schlam that I would be a likely candidate to co-operate and help the Government out in this instance.

Q During the course of this conversation, did you in addition to proclaiming your innocence -- did you tell Mr. Condon -- did you disclose to Mr. Condon your defenses in this case?

A With respect to that I told him that I would go to jail --

MR. RYAN: Excuse me.

Could you fix when this was?

MR. KLEIN: What time during the date?

MR. RYAN: When in relation to the

events is he saying this conversation took place?

MR. KLEIN: During the conversation with Mr. Condon in this building here.

MR. RYAN: No, I mean was this in the small office, later in the big conference room? Was it with Mr. Berry present, when was it, please.

Q All right, when you disclosed your defenses to Mr. Condon, was it in the big office and who was present or the small office?

A When -- rather, we stayed in the small office for a short period of time -- not even a minute or two. Went to the larger office, the conference room and stayed there for the entire duration of the conversation.

Q Was Mr. Berry present or not when you disclosed your defenses to Mr. Condon or were you alone?

A Just myself and Dennis. Mr. Berry was out of the room.

Q What was your answer, did you disclose your defenses in this case to Mr. Condon?

A As it turned out, yes I did.

MR. RYAN: May we have the exact conversation, please?

MR. KLEIN: Yes, surely.

Q What did you tell Mr. Condon in disclosing your defenses?

A I repeated to him that he had told my girlfriend, Ellen Preston, that he and Bob Denisch were involved with banks and to her he admitted I had nothing to do with it and she would come forward and state that at my trial, if and when we went to trial. I also stated that my reputation with the police department, which I cultivated for nine years, was above reproach and my assignment in the police department -- that of the Chief Inspector's Confidential Investigating Unit -- that I was held in high regard and I couldn't have gotten that job if my integrity or personal honesty at the time was in doubt.

Q Did you tell him about the loan, that you had a receipt for the loan?

A Yes, I mentioned I was the only friend that loaned you money when you were in jams and when you got in a big jam in England, that you were stranded, that I loaned you $300.

Q Did you tell him that you didn't know most of the other defendants here?

A I said with the exception of Sonny Montello I didn't even know the other people involved in this case, let alone

had conspired with them or met with them or had any dealings with them at all.

Q After that conference, where you ended up telling Mr. Berry and Mr. Condon that you couldn't do it, you couldn't testify because it wouldn't be true -- whatever you said, did you have a conference with any other law enforcement agents?

A About a week after that I had a conversation -- I had a phone call from Detective Rooney.

MR. KLEIN: Your Honor, at this time I ask that Mr. Rosa be excused from the courtroom.

(Detective Samuel Rosa leaves courtroom.)

Q Yes.

A Detective Rooney called me up and said -- our conversation was, "Hi, this is Detective Rooney. How's everything -- how's everything going? How did you feel?"

He said, "I'd like to talk to you -- I'd like you to come down and we'd like to talk to you."

I said, "Fine. What precinct are you at -- where's your office located at?"

So he turned around and said, "I don't want to meet you at the precinct or headquarters or anything -- why don't I meet you on the outside, a coffee shop or a diner somewhere?"

So I says, "Well, that would be all right. Where do you want me to meet you?"

He said, "Do you know Sheepshead Bay in Brooklyn?"

I said, "Yes, I do."

He gave me the location of a place called the Flame Steak House or Restaurant -- I think it was a restaurant or Blue Flame -- it was a hamburger and steak place.

He said, "Would you meet me down there, I'd like to talk to you."

So I said, "If you think it's better I'll meet you there

I met him at this place on Avenue U and Garrison --

Q Who was present?

A Detective Rooney and Detective Rosa.

Q Did you have a conversation then?

A Yes, they sat down and said, "Have a cup of coffee."

How was I doing -- fine -- pretty good.

Then he asked me, "Has the FBI been talking to you lately?"

I said, "Outside of two weeks ago, they haven't."

"We don't like them guys either that much at all. They keep us in the dark too much and we don't like to deal with them. We wanted to talk to you as cop to cop."

I said, "Fine. What's on your mind?"

So Detective Rooney says, "Look to be very honest with you, unlike the FBI we need your help very, very badly

on this and other matters.

He didn't specify what.

"We need your help. If you could co-operate and testify, I could almost guarantee we'd go right up the line, including to the trial commissioner and make sure that you got your job back and you would have no more problems with the Federal authorities. We'd go to bat with you to the United States Attorney, right up to the Federal Judge in your case and we could almost guarantee that you would come back to the job."

That meaning regain my position with the police department.

Q Reinstated?

A Right.

Q What did you say?

A So I says, "Detective Rooney and Detective Rosa, I don't know anything about what I am being charged with in this particular instance, let alone other things that you haven't even specified."

I says, "Anything that I would have to say in this case would have to be a lie. I know nothing about it. I don't even know the other defendants involved in the case."

He turned around and said, "You have a terrific reputation, we can't believe that you could get involved with

this thing."

I says,"The only way I got hooked with it was through Dennis Condon and Robert Denisch."

(continued on the next page.)

Q Did you deny your guilt?

A Yes, I told him whatever you may think, this is still an allegation and I will have an opportunity to answer this in court and I will plead my innocence.

Q Did you tell them you could not do what they requested?

A Yes. I repeated it two or three times.

I knew little enough of what I was being charged with and I couldn't testify to something I knew to be a lie.

Q Mr. Bollella, don't you know that if you testified like Denisch and Condon did you would not be here as a defendant facing twenty-five years?

A Yes.

Q And you still came to court to take your position as a defendant?

A Yes, I did.

MR. KLEIN: You may inquire, Mr. Ryan.

RECROSS-EXAMINATION

BY MR. RYAN:

Q In that conversation at the Blue Flame did Detective Rooney say to you, if you are innocent give us a lead and we will investigate it for you?

A No.

Q He said nothing like that?

A No.

Q No words to that effect?

A Not that I recall.

Q Did you call your lawyer Lavelle when Detective Rooney called you for that interview at the Blue Flame?

A Yes.

Q Did you call him before you went to the Blue Flame?

A Yes.

Q What did your lawyer tell you?

A He wasn't at the office.

Q Did you tell Detective Rooney I am not talking to any law-enforcement officers. My lawyer tells me I should not talk to law-enforcement officers without his consent.

A I believe I said something to that effect.

Q What did you tell him?

A I don't recall. I recall mentioning to him I did have a lawyer and that he was surprised about the conversation with the FBI at the United States Attorney's Office.

Q When Detective Rooney called you for the appointment at the Blue Flame did you tell him I am not talking to any law-enforcement officers without my lawyer present?

A He said I want to talk to you, cop to cop.

Q Did you tell him I am not going to have any conversation with you cop to cop without my lawyer present?

A I don't recall.

Q Did you tell him that you are being framed by Dennis Condon?

A Not over the telephone.

Q Did you tell him that at the Blue Flame?

A Yes.

Q Did you tell him that you believed Dennis Condon was framing you?

A Yes.

Q Did you tell him that Robert Denisch is also framing you?

A Yes. The only reason I am in this case is because of the testimony of Condon and Denisch.

Q Did you tell him that testimony is false as to my involvement?

A Yes.

Q All at the Blue Flame?

A Yes.

Q When you were in the United States Attorney's Office, or rather before you got to the United States Attorney's Office and you received a phone call, it was either Agent Berry or Agent Small?

A Agent Berry called me prior to coming down here.

Q Did you tell Agent Berry that I am not coming to any United States Attorney's Office for any conversations unless my lawyer is present with me?

A No.

Q And Agent Berry told you in that conversation that Dennis Condon won't be here, so you'd better hurry down?

A You'd better hurry down. You are facing twenty years and do yourself a favor, he said. He won't be here for long. Hurry up down.

Q Did you tell Agent Berry I don't care what your hurry is I am not coming down there without my lawyer present?

A No.

Q You knew at that time that Dennis Condon was framing you, didn't you.

A I didn't know that.

Q You were named in an indictment returned by the Grand Jury before you went to the United States Attorney's Office?

A And I was told Robert Denisch's testimony was the basis of that.

Q Did you tell the United States Attorney you were not coming down because Denisch is framing me?

A No.

Q You knew that Denisch was the source of the

evidence for that indictment against you?

A That is correct.

Q Did you tell Agent Berry you were not coming down because you have witnesses framing me?

A No.

Q How long have you been in the police department?

A Seven years.

Q Have you ever testified in court during your time about the police department?

A Many times.

Q Where do you live, sir?

A Manhattan.

Q Mr. Lavelle has an office where?

A In Carle Place, Nassau County.

Q How did it come about that you retained a lawyer in Carle Place?

A Through a mutual friend.

Q Who was the mutual friend?

MR. KLEIN: Objection, your Honor.

THE COURT: Overruled.

Q Who was the mutual friend?

A As I recall, it was somebody -- my mother is politically involved in the Republican Party, and it was one of her friends who recommended a good criminal lawyer.

THE COURT: I will deny it.

BY MR. RYAN:

Q When you were in the conference room with Dennis Condon alone, as I understand your testimony, you kept asking Dennis Condon, "Why are you implicating me"?

A That's correct.

Q You testified you asked that about four times?

A Maybe more.

Q Did you ever ask him, "Why are you implicating these other people, too"?

A It wasn't my concern. My concern was why I was indicted and why I was being charged with the crime.

Q You were charged with conspiring with these other defendants?

A I told him with the exception of one or two of the defendants, I didn't know these people.

Q Did you ask Condon "Why are you framing the other people I'm supposed to be conspiring with"?

A I asked him why he was framing me.

Q Did you ask him why he was testifying against the other defendants?

A No. I asked him why me.

Q You did not ask him one question about why

he was testifying about the other people you're alleged to have conspired with?

A No, I did not.

Q Did you also testify that at the meeting with Condon, Condon told you he hadn't testified in the Grand Jury?

A At that point he told me pending the outcome of the conversation with myself, he was going to testify to the Grand Jury.

Q Did he say anything about whether he would implicate you in a Grand Jury proceeding?

A He told me pending the outcome of the conversation he had with me, he was going to testify to the Grand Jury.

Q Did you understand Dennis Condon to be telling you if you did the right thing you would lnot be implicated in the burglary?

A He stated if I became a Government witness as he decided to become, that I would not face a jail term at all.

Q Did he say anything about what he could testify to?

A all he said, "Do what I'm doing. We will tell you what to say."

Q Condon said he would tell you what to say?

A "We," meaning he and the Government.

Q When Condon told you that "We will tell you what to say" --

MR. KLEIN: Will you instruct the U. S. attorney to look at the witness instead of fawning upon the Jury?

THE COURT: I appreciate your efforts to help things.

Mr. Ryan, try to focus on the witness. I would suggest that we have no more interruption unless they have mor substance than that.

MR. RYAN: Would you read the last question back?

(Question read.)

BY MR. RYAN:

Q When Dennis Condon told you, "We will tell you waht to say," what did you say to Dennis Condon?

A I said nobody has to tell me what to say. I know I did nothing and I have nothing to fear to go to trial.

Q Did you ask him who is "we"?

A He told me "We, me and the U. S. attorney will tell you what to say."

Q If you followed that, according to your testimony, they would have been asking you to commit perju

a crime?

A Right.

Q Did you say to Condon, "I'm not going to commit puerjury for anybody"?

A I told him I won't lie. I had nothing to do with this and the facts will come to bear at the trial. I won't cooperate with him or anybody else, I told him.

Q Did you cry during this conference?

A No.

Q At any time in the U. S. attorney's office?

A No.

Q When Condon told you he hadn't testified in the Grand Jury yet and it was pending this hearing, do you know whether or not Condon had implicated you?

A In what respect?

Q At the time you met with Dennis Condon, are you telling us he hadn't implicated you?

A He told me he had fully intended to, but pending the outcome of this conversation that he was going to testify shortly and that he would implicate me depending on how the outcome of the conversation was.

Q It was your understanding he hadn't implicated you at this point?

A From what he said, yes.

5

Q You know it's a fact on the day he was arrested he swore under oath that you participated in this conspiracy and burglary?

MR. NEWMAN: I object. There is no such testimony.

THE COURT: What do you mean by swearing under oath? Do you mean that --

MR. RYAN: Yes.

Q Don't you know that he swore under oath?

A No. Up to the time he told me he was going to implicate me, if I didn't cooperate he would have to implicate me if I didn't want to go along with the Government -- just a minute.

Up until the time I met him face to face, I didn't know for a fact he had considered or become a Government witness.

Q You learned after that that he had implicated you under oath?

A Only at this time he said at the time he was arrested he decided to be a Government witness.

MR. LEWIS: You asked him whether he swore under oath --

THE COURT: Mr. Ryan said he could establish that. Is that correct, Mr. Ryan?

MR. RYAN: In the materials furnished in the 3500.

MR. LEWIS: Under 3500 statement made to an FBI agent?

MR. RYAN: Let me get it.

THE COURT: Is there something under oath sworn by?

MR. RYAN: Yes, let me get it.

Mark this, please, four-page report, Government's Exhibit, dated July 19, 1972.

THE CLERK: Five-page document marked for identification as Government's Exhibit 11.

xxx (So marked.)

THE COURT: What is the number?

THE CLERK: 11.

BY MR. RYAN:

Q Look at Government's Exhibit 11 and tell us whether or not you have seen that before, Mr. Bollella?

A This report I don't believe I've ever seen.

MR. LEWIS: May we have a side bar discussion, your Honor? I think it's important.

THE COURT: All right, come up here.

MR. RYAN: May I have the document, please?

(The following took place at side bar, out

PLEASABLE

of the hearing of the Jury.)

MR. NEWMAN: May I see the report?

THE COURT: Yes.

MR. NEWMAN: That's not sworn bo, your Honor.

THE COURT: Mr. Ryan, this isn't a sworn statement.

MR. RYAN: This is a reproduction of the [illegible] the end: "Witnessed by." [illegible] true and correct.

MR. HOCHHEISER: "Witnessed by" is not sworn.

THE COURT: It isn't sworn under oath.

MR. RYAN: We will have to get the original. My impression is it was sworn under oath.

MR. LEWIS: You are familiar with FBI reports.

THE COURT: It would be unusual to have it sworn under oath, but I don't know what happened. If there is an original that says he was sworn that would qualify it, otherwise we will have to explain to the Jury it seems to me that it is not a sworn statement.

MR. RYAN: Based on what I am reading, I think I made an error in saying it was sworn but

he did implicate Bollella which is the whole thrust of the meeting.

THE COURT: This is prior to the meeting?

MR. RYAN: Yes. This was furnished before the trial began.

MR. LEWIS: He can't use this statement to say Bollella was implicated by Condon.

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(Continued on next page.)

RECROSS-EXAMINATION

BY MR. RYAN: (Cont.)

(Side bar discussion, continued.)

THE COURT: I understand that.

MR. NEWMAN: I move for the withdrawal of a juror and declaration of mistrial on two grounds: One, the revelation in the presence of the jury of the delivery of 3500 material, which is specifically prohibited by a whole series of Second Circuit cases; secondly, the misrepresentation to this jury, which in my judgment couldn't be cured, that this is a sworn statement which carries with it such tremendous import that can't be cured by a later explanation.

I think it was prosecutorial misconduct and calls for a mistrial.

MR. HOCHHEISER: The question was asked with some emotion attached to it as opposed to a calm question.

THE COURT: The defense asked questions with emotion, too.

MR. NEWMAN: I am not going into the emotion part.

THE COURT: One question to you with respect to the first part of your motion: Do you say in spite of the fact what counsel says, that it becomes a mortal sin if you call it 3500 material? I can't believe that. I deny that.

MR. NEWMAN: In effect by Mr. Ryan's statement that it was a sworn statement, I think what he did was make himself a witness in this case and put the credibility and veracity of the U. S. Attorney's Office behind that statement. I add that to the ground for the declaration of a mistrial.

MR. KLEIN: This statement is made by an agent.

MR. RYAN: It is a signed statement in his own handwriting. I will get the agent.

MR. LEWIS: May I say the words "under oath" should --

THE COURT: I am going to require Mr. Ryan --

MR. LEWIS: Just a minute. I want to say, when you say a sworn statement under oath, it means an acknowledgement. There is a

difference between that and a notary stamp also.

THE COURT: I deny the motion.

MR. FISCHETTI: I just join in the motions generally.

(In the hearing of the jury.)

RECROSS-EXAMINATION

BY MR. RYAN: (Cont.)

Q Exhibit 11, that's not a statement under oath by Dennis Condon, is it?

A From what I can see --

MR. LEWIS: You explain it to the jury, your Honor.

THE COURT: Yes. Mr. Ryan, the prosecutor, made a mistake when he referred to a statement under oath. The statement he is showing the witness is not under oath. It is a statement signed by Condon and was witnessed by one or two FBI agents at the time it was taken.

It was not a sworn statement. He was not sworn to tell the truth. To that extent, I ask you to erase from your minds and do the best you can because it is difficult to erase from the mind. I recognize that. But I am asking you to try to disregard entirely such a

statement made by this prosecutor and I ask Mr. Ryan to please be more careful because it is important in a trial that the Government not create false impressions in the minds of jurors.

MR. RYAN: There was no intention to create a false impression.

THE COURT: I am not investigating your intentions. I am commenting on your conduct.

BY MR. RYAN:

Q Is it a fact that Condon implicated you in a signed statement on the day he was arrested?

MR. LEWIS: I object to this.

MR. KLEIN: I object.

THE COURT: The question is did you know that, MR. Bollella?

THE WITNESS: No.

Q You thought the first time he would implicate you would be after this meeting in the U. S. Attorney's Office, correct?

A Up until the time I met him face to face in which he told me he would have to implicate me whether he wanted to or not, I did not know that he agreed to become a Government

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MR. RYAN: Would you mark this card, please?

Mark it 15-C.

THE CLERK: One card marked for identification as Government's Exhibit 15-C.

Q Would you look at Government's Exhibit 15-C and tell us whether or not you recognize it?

A This I recognize.

Q What is it?

A It is a notation of loans that I had made to Dennis Condon.

Q When did you make the loan?

A According to this, May 15, 1971.

Q May of 1971; is that correct?

A Right.

Q Did he pay back the loan in full?

A Not quite, no.

Q How much did you loan him in May of 1971?

A It says $300.

Q Do you have any doubt that you loaned him $300 in May of 1971 according to your own record?

A According to this I did loan him that much money.

Q How much did Dennis Condon pay back on that $300 loan according to your records?

A Approximately $250.

Q He did not pay you back in full; is that right?

A That is correct.

Q Did you make any notation as to when he paid or made the last payment?

A It says 9-13-71. It looks like '71.

Q That is before the Markel's job, right?

MR. KLEIN: I object to that, your Honor.

THE COURT: Mr. Ryan, was that necessary?

I am going to ask you to please refrain from that.

MR. RYAN: Yes, your Honor, I am sorry.

THE COURT: That is not enough. You have an obligation as a Government prosecutor not only to be firm but also to be fair.

MR. RYAN: Well, there was a lot of testimony about that, your Honor.

THE COURT: I understand that, but the implication of the remark is at the moment that this witness had something to do with that and there was no testimony to that effect.

MR. RYAN: No, your Honor. There is no claim that this man had anything to do with Markel.

THE COURT: All right. This is a good time to recess. We will recess until 2:15 p.m.

(The jury withdrew from the courtroom at 1:00 p.m.)

(Out of hearing of the jury.)

MR. RYAN: Your Honor, the admonishment before the jury I would like to address myself to that.

No. 1, there were days on cross-examination about the Markel's job. There was no allegation that this witness was participating in Markel's job. The dates were fixed that it was the end of September that Condon and Denisch participated in the Markel job. The date on the notation on the card for the Condon loan is September 13 and what I proposed to do in propounding that question was simply to call attention to the witness the time of the last payment in relation to the testimony he heard that Condon participated in the Markel's job.

THE COURT: I understand, Mr. Ryan, but the implication which a lay jury might derive from that question is that in some way this witness had an intimate knowledge of the Markel's job and as I

remember the testimony that is not the way it came out. There was some discussion by Condon about various things that he did that he was dissatisfied with but the implication that this was right after the Markel's job could have implied and could certainly be construed to imply that this witness had something to do with it.

MR. RYAN: T he last payment was before the Markel's job.

THE COURT: I know, but you said right after the Markel's job, if I remember your comment.

MR. NEWMAN: That is right.

MR. RYAN: No, I said the Markel's job was right after the payment.

THE COURT: No, that is not the way I remember it.

MR. RYAN: I regret that. I regret that very much.

THE COURT: That is what got me upset.

All right, gentlemen, 2:15 on the nose.

(luncheon recess)

Q Did he ever borrow money from you?

A No.

MR. RYAN: I offer 18-A in evidence.

(Document handed to Mr. Klein.)

BY MR. RYAN:

Q Now, Mr. Bollella, you have testified you never received $5,000 from Robert Denisch?

A That is correct.

Q And do you recall the testimony that he gave that that came from the Chase Manhattan Bank burglary?

A Yes, I do.

Q And you had nothing to do with the Chase burglary: right?

A I had nothing to do with any burglaries.

Q All right.

Do you know when the Chase burglary took place?

A According to the testimony, sometime in the end of April.

Q Would April 28th refresh your recollection?

A Sounds like the end of April, yes.

Q Now, you testified that it was impossible for you to get the money from Denisch: do you recall that?

A I believe that is what I said, yes.

Q Why do you say it was impossible?

A Because, number one, I never received any money from Mr. Denisch, certainly that amount, and I would never have occasion to take any kind of money like that.

Q Well, would you ever have occasion to meet him after April 28th?

A I believe I did meet him after April 28th.

Q Where did you meet him the first time?

A I met him several times in the diner in Brooklyn near where he used to work, or -- I shouldn't say -- in the vicinity of where he worked.

Q What is the name of the diner?

A If you ask me, I don't know.

Q Would Tooney's Diner refresh your recollection?

A Possibly that would be it.

Q Can you tell us how long after April 28th you first met Mr. Denisch?

A I couldn't tell you, I don't know.

(continued on next page.)

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want to call them it will put me in a bad light.

THE COURT: Isn't it certain they will appear?

MR. NEWMAN: They will corroborate what the documents seem to indicate. We will have somebody here tomorrow morning. We have not interviewed the person.

THE COURT: Suppose I put it on a may basis?

MR. HOCHHEISER: Perhaps the explanation would be more appropriate if and when it occurs.

THE COURT: Yes, that is a better idea. I agree with that.

We will have this understanding: If you decide after interviewing these witnesses to put them on, then I will tell the jury we are going to interrupt the Government's rebuttal case to enable you to put these witnesses on who could not be available at this time.

MR. SONENSHINE: That is very fair.

MR. RYAN: I have no reservations about proceeding into this matter in the presence of the jury, but I think I ought to bring it up now to ensure there is no problem.

I intend to put Detective Rooney on and

when he testifies about the meeting at the Blue Flame, that is what the witness testified to the meeting being at, the Blue Flame; at the conclusion of that meeting Mr. Bollella gave a reason why he could not be a witness, and the reason he gave was that, "I would rather be alive in jail than dead as a witness."

MR. SONENSHINE: That is what the detective is going to testify to?

MR. RYAN: The reason the witness gives for not cooperating in his direct testimony is that he wasn't going to cooperate because he would have had to commit perjury and participate in a fraud. That was the clear reason as I understood his testimony in the case, but the reason he gave Detective Rooney was nothing like that. He never told Detective Rooney I cannot testify to something that would be a lie as Mr. Bollella testified here when in fact near the close of this meeting at the Blue Flame, it is really the Burger Flame, he testified that I can't, I would rather be alive in jail than a dead witness.

THE COURT: Oh, here is Mr. Klein now.

Will you repeat that, Mr. Ryan?

MR. RYAN: Detective Rooney will testify at this Blue Flame meeting that your client testified and eventually said that he cannot become a witness because he would rather be alive in jail than a dead witness or dead on the street or words to that effect.

MR. RYAN: I have a statement given in the 3500 material, a report made by Mr. Rooney, and the report says nothing was said.

MR. RYAN: It does not say that.

THE COURT: All right, under those circumstances I suppose you can call for the report on cross-examination and get him to admit that. Then isn't it a question for the jury?

MR. KLEIN: That is prejudicial to everybody here.

THE COURT: That is Bollella's last statement. That couldn't be as I see it any kind of declaration made in furtherance of a conspiracy.

MR. RYAN: Right.

THE COURT: Because the conspiracy had completely come to an end.

MR. RYAN: Nobody is pressing that.

THE COURT: Let me hear what your legal grounds are.

MR. SONENSHINE: It is along the same lines we have urged on prior occasions.

THE COURT: That would have a prejudicial effect?

MR. SONENSHINE: Prejudicial comments not involved in the conspiracy and in no way attributable to any defendant under any theory of law.

THE COURT: This, as I see it, is the subject of why he wouldn't testify and it has been gone into. This morning I thought there was going to be a decision on that subject. Apparently there was. Now it has been done and I take it this morning it was done in consultation with other counsel, too.

MR. SONENSHINE: There wasn't any unanimity on the subject.

MR. NEWMAN: I do not think that comes into it. All other counsel can do is state their opinions and beliefs and it does not control what a witness wants to do or testify to.

7

You can appreciate the definite distinction in a situation. I really don't think we have to go into the question of consultation. I think the prejudice against these defendants will so outweigh the probative value that it is really almost an equitable situation or decision that your Honor has to make.

MR. KLEIN: As against Bollella it is an omission or confession of guilt. If he says that --

(continued next page)

THE COURT: That is true, it could be as to him. That is one reason which would be argued for its admissibility even as to him alone.

What they are arguing about is the prejudicial rub-off effect on them, but the trouble, as I see it, even though this is Bollella's cross-examination and you did not engage in that, nevertheless the point has been made generally throughout cross-examination and the defense attack on really the Government's virtually indulging in the fabrication of the case.

MR. LEWIS: It all revolved around Mr. Schlam and Agent Berry and in this building. I never knew about the Burger Flame.

THE COURT: I am sure he didn't write that statement on the wall.

MR. LEWIS: I never saw anything about a conversation with Rooney in the Burger Flame.

THE COURT: You know investigative agents are just like us. They are only human. You cannot possibly report every bit of information. As I say, it gets down to whether or not the jury

when confronted with the fact that at the time he made a report which I suppose was quite approximate to the time when whatever was written up was written up, that no mention is made of this.

MR. LEWIS: I never saw this before.

MR. SONNENSHINE: Nor did I.

MR. KLEIN: It was given to me.

MR. LEWIS: We never saw it.

MR. KLEIN: Mr. Ryan gave it to me before.

MR. LEWIS: Bollella -- well, I can understand statements made by Bollella which we couldnt ask for because the rules don't provide for that.

THE COURT: In any event, the statement is not in the report.

MR. KLEIN: This is by Mr. Rosa and it says no results were obtained from this interview. Now we are going to have Detective Rooney get on the stand and contradict this and say there was an admission of guilt and fear of a threat on the other defendants.

THE COURT: Well, that is argueable.

MR. KLEIN: We are being conned into this situation. The same thing with Mr. Schlam's year-late statement earlier this morning. We

couldn't make a decision on it and it looked like we were being coerced not to proceed on it.

Why must we have last minute things here?

THE COURT: You are saying is the Government is barred from exploring the recollection of a Government witness simply because some statement hasn't been included in detail when they wrote it up? I don't understand that to be the rule.

MR. KLEIN: I asked for this outside of the presence of the jury and you denied it and I was forced to go into it in front of the jury.

MR. LEWIS: We can circumvent Rule 16 easily if we are going to do that. Let one agent give a report like this and the other agent has devastating material not included and suddenly we are confronted with it. That is not the purpose of Rule 16.

If this man knew about it, certainly Mr. Ryan knew about it and he should have said that the report doesn't include all the material.

MR. FISCHETTI: The prejudicial effect here is so far and outweighs the probative value and Mr. Bollella testified he never met Mr. De Conza

and I believe everybody -- well, I am going to be confronted with some death threat that is going to involve my client. There is noway I can count it.

MR. NEWMAN: Aren't the interests served if Mr. Ryan commended admissions were made by Bollella and that [illegible] the overriding prejudicial aspect to other people. That is providing to the alleged speaker certain things. Here you are ascribing to the alleged speaker the operation of his mind conducted in a statement against nameless people and it is impossible for us to defend against it.

THE COURT: I understand that. I must say to Mr. Ryan, really isn't the testimony that he had been threatened by anyone --

MR. RYAN: I am not offering it as a threat by anyone.

THE COURT: You say it implies an admission on his part?

MR. RYAN: Of guilty knowledge, in addition, it rebuts his present testimony that he couldn't cooperate because to do so he would be

participating in the fabrication of the case.

MR. KLEIN: In other words it is not an admission but once the jury hears it, no matter how you tell them, they can take the hypothesis to believe the worst.

THE COURT: It is a tough one but I must say I am persuaded by it as another view of the [illegible] I am going to permit it but I am going to instruct the jury that they are not to consider it with respect to the other defendants or as implying anything because there is no such evidence as I recall it and we will have to let it go as that.

MR. KLEIN: I ask for the withdrawal of a juror and the declaration of a mistrial. My client cannot get a fair trial because of the midconduct on behalf of the prosecutor.

THE COURT: What you are saying, because the Government hasn't provided you with a verbatim transcript of everything that the defendant said to the law enforcement officers a year ago, that he just can't be tried. That I cannot agree with.

MR. KLEIN: I am saying when the Government

had two agents on the scene who are both present at a conversation and one of the agents, a police officer makes a report which states: "No results were obtained from this interview," that the defense has a right to rely on that statement and that it is unfair --

THE COURT: I don't think you have a right to rely on anything in this regard. There is nothing in Rule 3500 as I understand it that says that you are entitled to have everything a defendant said, whether it is recorded or not.

MR. FISCHETTI: Isn't this motion based on Rule 16 rather than 3500?

THE COURT: Yes, and even under Rule 16 it is any statement of the defendant that exists that is written, recorded statements or recorded confessions, and that was not written or recorded.

MR. FISCHETTI: I think Mr. Klein's point under Rule 16 is that he was misled on a report he received. He does have a written report and that report does not include a specific damaging statement by his client and he has already placed his client on the stand. That is the thrust of his argument.

7

THE COURT: I don't follow that. The report was not given to him as a statement made by this defendant. It was given to him to enable him to combat this testimony with regard to an unrecorded statement.

MR. NEWMAN: No, it was given to him the first day before the trial started when we had the so-called Messiah hearing.

THE COURT: Because he called for not only FBI reports but any reports that might have been in the possession of the police officers who were on the case.

MR. NEWMAN: This sort of document would really make a nullity out of Rule 16 if we think about it for a minute. Let us assume an agent interviews any and they put down interview held unsuccessful and they furnish that report and on the surface they have complied with Rule 16 in that they have turned over the report of that interview whereas, in their own mind, the defendant said to them I absolutely did everything you are accusing me of, and based on this a lawyer puts the defendant on the stand and he testifies and the Government on rebuttal puts

8

the agent on the stand and he says it wasn't recorded --

THE COURT: You are overlooking that the report wasn't written for the purpose of exploring this defendant's knowledge, if any, of what they thought he had been involved in or what in fact he had been involved in.

The purpose is to try to get him to become a Government witness for whatever reason. It was unsuccessful because they didn't get him to be a Government witness. In his direct examination he has been examined on the reasons why and the reasons he gave were that he wouldn't become a party to a fabricated case. This to my way of thinking bears directly on the veracity of his statement and while I recognize the prejudicial effect, I cannot say that prejudicial effect overcomes the probative value so far as bringing out the truth here with respect to what was said.

MR. SONNENSHINE: Irrespective of what your ruling might be, if Bollella were the only defendant on trial maybe you would admit it and maybe you wouldn't, but irrespective of that,

9

the other defendants are in legal contemplation here on trial and are separate and apart from each other. This is only for the completion of the forum.

THE COURT: The jury will be charged, as you know, fully as to the law, as to what the law permits on the rule that each defendant

As I said before, all I can do is, at the time this comes out, if it does -- and Mr. Ryan thinks it will -- will be to caution the jury at this point that this is something which bears in reality on the question of whether-what this witness' state of mind was. He is saying, "My state of mind was that I was resisting the offer to cooperate because I viewed this case as a complete fabrication and I wouldn't lend myself to it.

This testimony tends to show in one sense it reflects upon the credibility on that story and in another sense it may imply some knowledge on his part and not necessarily implication, but something that prompted the police officers to go to him in the first place.

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MR. SONENSHINE: Your Honor, I understand that fully, and I can appreciate what you are saying.

Your Honor, I would like your Honor to consider what might happen if Bollella were on trial himself, let's suppose that all the defendants were on trial with the exception of Bollella, and the prosecution wanted to put that statement into evidence, do you think it would be proper to do so?

I think your answer would probably be no, and I don't see how it could be anything otherwise.

THE COURT: You are asking me a hard question, because I don't know what would happen under those circumstances --

MR. SONENSHINE: Yes, it is a hard question, but, your Honor --

THE COURT: The fact is, he is in this case, too, and I can only attempt to do my best, and to make it clear to the jury that this statement is offered as against him only.

You must bear in mind that he is the only one who has admitted close friendship with Denisch and Condon, the only other testimony on that score

came with respect to the knowledge of the others, this pretty much came from Condon and Denisch.

What I am trying to say is that it is still possible for the jury to conclude that he is more implicated with them than with anybody else. They have his statement that he didn't even meet some of these people until the day he was arrested.

MR. SONENSHINE: Well not when you consider what Condon has testified to, and what Denisch has testified to.

I don't want to belabor this further, your Honor apparently has reached a ruling.

THE COURT: I understand the problem, I assure you.

MR. SONENSHINE: I have no doubt you do.

THE COURT: I am going to rule the way it has to be, and I am going to try myself to make certain that the jury understands, and that this is coming, something attributable to Bollella, that this is not a declaration of any kind in furtherance of the Conspiracy as alleged in this indictment, that it bears essentially on the credibility of this man's explanation with respect to the reasons why he wouldn't cooperate, and that

it is to be taken as to nothing more than that, that it is only binding on him as the person who uttered it, and not on anyone else.

Now, I will do my best to give them a complete Charge --

MR. SONENSHINE: To my knowledge, you have always done your best, sometimes because of the circumstances or for legal reasons, nobody's best is good enough, because there is no way legally to accomplish it.

THE COURT: That is for a higher Court to say.

MR. LEWIS: Your Honor, may I say something --

MR. SONENSHINE: Let me say something, Mr. Lewis, I want to make sure I have it on the record.

If and when your Honor admits that into evidence, it will be admitted over my objection, and I ask that you deem this as an offer, as an application for a severance, or for a mistrial, in the alternative.

THE COURT: I assume that will apply to all the other defendants as well -- except, of

course, Mr. Klein.

MR. HOCHHEISER: We join in that, your Honor.

MR. NEWMAN: Yes, your Honor.

MR. FISCHETTI: Yes, your Honor.

MR. KLEIN: Your Honor, as to that last portion, I would like your Honor not to instruct the jury that it is evidence of anything other than explaining his reason or why --

THE COURT: I stated, it is his state of mind.

MR. KLEIN: That is right, his state of mind, that is right. It is not an admission or a confession or an implication --

MR. RYAN: That is for the jury to decide.

THE COURT: I will have to see.

I think it primarily goes to the state of mind of the defendant, and the question of his veracity with respect to it.

MR. LEWIS: Judge, may I say this, I assume I am the last, as always happens, because I am the oldest and the smallest.

THE COURT: Oh, Mr. Lewis.

MR. LEWIS: Your Honor, it is my feeling

that this case comes within the purview of United States against Aaron, which was decided by our Court of Appeals on March 10, of 1972. That was a case tried before Judge Weinstein, and it involved 3500 Material.

The Government put a FBI Agent on to testify that the defendant had told him that he had been indebted for about $10,000 worth of gambling debts out in Puerto Rico.

Now, they gave me 3500 Material, but there wasn't one word in it, and so, based on what I assumed was the good faith of the prosecutor, I used the 3500 Material, and I said:

Now, isn't it a fact that there is not one word in there about gambling debts?

And he said:

Well, Mr. Lewis, I gave him, the United States Attorney, another report.

At that time, I called for the other report.

Now, the other report did have something, and, of course, I pointed out to the Court of Appeals that I had led with my chin, and, fortunately, the Court of Appeals agreed with me, and

they reversed.

Now, I say the same thing happened here with Mr. Klein, Mr. Klein, after getting this interview report concerning that which allegedly took place in the Blue Flame, and relying upon this report, then asked his client questions.

Now, Judge, I assume, and properly so, that had Mr. Klein known that there was something in this interview report which Mr. Rooney would say that Mr. Bollella said, he would rather go to jail than be a dead hero, I am sure that Mr. Klein would not have propounded those questions.

But I say he was misled, and based upon the integrity of the Assistant United States Attorney, and of the Law Enforcement Agents, he had every right to believe that this was the interview, and this is what was given to him before the trial started, and that this was pursuant to Rule 16(a), and based upon that, and on the good faith, he asked the question which has now boomeranged, because the Agent is going to take the -- the Detective is going to take the stand and put a lie to Mr. Bollella.

Now, he never would have asked that, I am

sure, and Mr. Ryan would never have been able to ask that on cross-examination, and the only reason he is getting it now is that he said it is to attack the man's credibility, and he says, well, Mr. Klein opened it up by asking the question, and I say Mr. Klein would never have opened up that door if he hadn't relied upon this statement, and that is just what Judge Waterman said, Judge, and that is that on reliance upon the statement, I asked those questions, and he said --

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THE COURT: Yes, but there is one thing which I think you are overlooking, you recall this morning when the question was raised by Mr. Klein as to whether or not if he went into the so-called Messiah aspects whether the Government would or would not produce Mr. Schlamm and perhaps some others to contradict the statements made, and so forth, and I understood that counsellors for a consultation to decide whether or not they should nevertheless go forward on the basis of the subsequent post-indictment, post-arrest conversations with Bollella.

Now again, and there is that aspect of it, but with respect to the Rule 16 aspect, I can only say that whoever wrote this rule said that the Government's obligation was to turn over written or recorded statements or confessions made by a defendant, and to my way of thinking --

MR. KLEIN: It means complete, your Honor.

THE COURT: (continuing) that means just what it says, until it is changed.

2

MR. LEWIS: Then we come to the 3500, the 3500 Material, and even though it is not written, if it is an oral statement they should turn it over and advise us of it.

But don't you see, Judge, if they give us a statement and if they omit material facts from that statement, then you are putting defense counsel at a disadvantage.

THE COURT: Let me ask you this, an oral statement pertaining to what? This oral statement pertains to the reasons why this defendant didn't become a cooperating witness.

MR. KLEIN: Your Honor, this is not an admission of guilt, and in addition this is in the absence of counsel and after indictment --

MR. NEWMAN: Your Honor, may I ask something?

Would it be out of line to suggest that Mr. Rooney take the stand so that we may hear from him, in the absence of the jury, what he is going to testify about.

MR. LEWIS: We would then find out whether he did make any report, too.

MR. HOCHHEISER: It would take about five

minutes.

MR. LEWIS: We could ask whether he didn't look at this report before it was turned over to us, did he say to Mr. Ryan that it was inconclusive, that that is not what took place.

MR. HOCHHEISER: May I just say --

THE COURT: Again, as I say, the purpose of that interview was not to obtain evidence from the defendant in question, obviously it is not, the F.B.I. would very likely have been the ones who did that part of it, what the police officers were trying to do was get him to agree to become a cooperating witness, and to that extent their mission was unsuccessful.

MR. HOCHHEISER: Your Honor, may I just, if I may, correct something that may be unclear in the record:

Your Honor alluded to the fact that there came a time when counsel conferred on the question of going into the Messiah issue. May I say, your Honor, that although we discussed what we understood to be the anticipated testimony about a conference with Mr. Schlamm or with Mr. Condon and so forth in this building, at no time did

anyone even suggest there was a possibility that we would be attacked with any information arriving out of a Burger Flame interview.

I can say, your Honor, that had that been, had that been in my mind or had I been aware of it , I still would be out in the hallway screaming my views at the other lawyers, and I don't think I would have come into the courtroom until I won.

MR. LEWIS: The only thing we discussed was Mr. Schlamm, Agent Berry and the other agent, we never knew a word or a thing --

MR. NEWMAN: And Condon.

MR. LEWIS: And Condon, but the question was never, we never knew a word about this. We thought Mr. Ryan was going to call Mr. Schlamm and put Agent Berry on and put Condon, those were the three people he said he was going to put on.

MR. NEWMAN: Judge, Judge, to rebut that, we never knew about Detective Rooney. If we knew about the possibility of a threat, that a threat might be engendered, and we were not near it, we would say that certainly the possibility of a

threat far outweighs any possible gain of Mr. Bollella denying or saying that he told him to play ball or something like that.

THE COURT: Yes, but I believe what happened was that it was Mr. Klein who chose to go into something beyond Schlamm and Agent Berry or Agent Small, and he went into this question of the Burger Flame Diner contact --

MR. LEWIS: That is something we knew nothing about, Judge.

THE COURT: I know, but there it is, and the Government I think has a right --

MR. LEWIS: Here is an interesting question: What would happen if I got up and objected when Mr. Klein said, Well, I am within my rights, I have the right to have my client questioned as to what happened at the Burger Flame.

Now, in that event, there are one or two things that you can do, you have to declare a mistrial or say, Go ahead, Mr. Klein, and I think then you would commit error.

I mean that those are the problems, Judge.

(continued on next page)

MR. HOCHHEISER: Your Honor, I'm sorry to interrupt for a moment, but while we are on this thought, can we take a few steps forward and think what this means:

What we have is a witness who says that Mr. Bollella said there was a threat, a death threat, to put it --

THE COURT: He isn't going to testify, that is all he said.

MR. HOCHHEISER: He said he would rather be alive --

THE COURT: That was his reason for not cooperating.

MR. HOCHHEISER: Well, that in my mind, to personalize it to my client, well, it is similar to saying that if I testified I am afraid that Mr. Ripoll -- and isn't that a crime? And if I might use the term, Might kill me.

Now, what would happen if while Mr. Bollella was testifying on cross-examination he said to Mr. Ryan, Mr. Ryan, you are right, what happened at the Burger Flame was that I said I'd rather be alive and in jail then a dead witness, etc., etc., and then I got up to cross-examine. Well,

it would be of course impossible, a Judge would say, Mr. Hochheiser, don't cross-examine him, you have no right to cross-examine him, I will instruct the jury, it only goes to Bollella's state of mind.

Now, that of course is absurd, I have made an absurd analogy, but what you are in effect doing is exactly the same thing.

This witness, Bollella, will be testifying on the witness stand and against his will, through the detective, and against my client, in effect that my client is thought by Bollella to be violent and that I have no right to cross-examine him, and the protection I have is that you are going to tell the jury that this goes to Bollella's state of mind.

Well, that is no protection at all, Judge, no protection at all. I don't have any control over the situation.

MR. FISCHETTI: Your Honor, that was the position I tried to make a little earlier.

MR. HOCHHEISER: I don't think that would be satisfactory, and to say that the door is opened, the door is opened to have the detective's

admission or confession and the officer testifying without stating Mr. Ripoll or Mr. X or Y or Z, or all of them, nameless individuals, that they are believed by Bollella to be capable of killing him -- I mean --

MR. RYAN: You can cross-examine the witness on that.

MR. HOCHHEISER: Which witness, Mr. Bollella.

MR. RYAN: Yes, you have the right of cross-examination.

MR. HOCHHEISER: How can I cross-examine him on what he supposedly said at the Burger Flame.

THE COURT: You have something there --

MR. RYAN: I'm sorry, I'm sorry -- well, no.

Your Honor, my recollection is in the Aaron case is that the Government had a 302 that had a statement conflicting --

MR. LEWIS: This is conflicting, too.

THE COURT: From what Mr. Lewis said there was another report which had a statement which they did not turn over but --

MR. LEWIS: Then they turned it over [illegible] right in the middle of the trial.

MR. NEWMAN: If I may turn to Mr. Lewis, sir, it was a 3500 Material case, a Jenks case rather than under Rule 16.

Is that right, Mr. Lewis, that was my recollection.

MR. RYAN: That is mine, too.

MR. LEWIS: Yes, Yes, the same philosophy.

THE COURT: What you are really saying is this:

Even if the Government turns over a written or recorded statement of any kind relating to an interview, that is a warrantee that it is full and a complete transcript of everything that was said.

That is about what it is --

MR. LEWIS: Or substantially everything that was said because it says "contemporaneously." Now, you can't really have everything unless you have a recording --

THE COURT: You have to bear in mind furthermore, as I say, that what is really intended there is that the defense be provided with any statement that a defendant has made concerning the commission of the offenses charged, and so forth.

This arose out of an entirely collateral attack on really the basic veracity of the Government's case, and that is to say, in the words of this witness, and it came through loud and clear, that he would not lend himself to what Condon was doing because he just could not tell a lie.

Now, to me, if there is nothin more, I have to admit it is contradictory to that position that such a statement, if it were made, should be permitted --

MR. LEWIS: We should have been apprised of it.

THE COURT: It has a prejudicial affect but I can't say it outweighs the probative value.

I will grant ycu an exception, and I feel we must get going or we will be on this case until Labor Day.

MR. RYAN: Can we mark the police report of September 6th, 1972 which is the same report referred to, this is referred to on July 2nd, 1973 at Page 109 and following.

THE CLERK: Document marked for identification as Government's Exhibit 20.

1

JAMES P. ROONEY, having been first duly sworn by the Clerk of the Court, testified as follows:

THE CLERK: State your full name for the record, please.

THE WITNESS: Detective James P. Rooney, Shield 2912, 11th Burglary and Larceny Division, New York City Police Department.

DIRECT EXAMINATION

BY MR. RYAN:

Q Detective Rooney, you have been assigned to this case, correct?

A Yes.

Q Were you assigned to this case prior to July 19th, 1972?

A Yes, I was.

Q Do you know the approximate date you were assigned?

A May 1st, 1972.

Q Did there come a time when you had an occasion to participate in the arrest of the defendant Bollella?

A I did.

Q Where did that take place?

A I believe it was 234 Fort Washington Avenue, County of New York.

A Not that I can recall, no.

Q Did you ever say to Mr. Bollella in the car that "If you cooperate, you will never see the inside of a jail?"

A No sir, I did not.

Q Now, did there come a time when you met Mr. Bollella after July 19th, face to face?

A Yes, sir.

Q Can you tell us when that was?

A To the best of my recollection it was September 6th, 1972.

Q And where did the meeting take place?

A In a restaurant in Sheepshead Bay called Burger Flame.

Q Was it the Blue Flame?

A No sir.

Q The Burger Flame?

A The Burger Flame.

Q Prior to the meeting at the Burger Flame, did you have a conversation with Mr. Bollella?

A Yes, I did.

Q Was it in person?

A No, sir.

Q Was it on the telephone?

A Yes, sir.

Q What was the conversation that you had with Mr. Bollella on the telephone?

A I called Mr. Bollella on the phone and asked if I could speak to him, I wanted to talk about his position in the case, but that I would not speak about the details of this case. I also informed Mr. Bollella that if he had a lawyer he was free to bring the lawyer too.

Q What did he say when you said that to him?

A He said "I'll meet you. Where shall we meet?"

He asked me was I in my office. I said "Yes, I was, but I don't want to embarrass you and I'll meet you anywhere you want" and we started talking about the area and we came to meet at the Burger Flame.

Q Now, how long after the phone conversation did you meet at the Burger Flame?

A I'd say approximately 45 minutes to an hour.

Q Who was present when you arrived at the Burger Flame?

A Myself and Detective La Rossa arrived and Mr. Bollella hadn't arrived yet.

Q Then there came a time when he arrived?

A Yes.

Q Did he come with a lawyer?

A No sir, he did not.

Q Then did you have a conversation with him?

A Yes, I did.

Q Would you tell us the conversation?

A I was having breakfast at the time that Mr. Bollella came in and I offered to buy him breakfast.

Q What time of the day was this?

A I would say approximately 11:00 A.M.

Q What was the conversation?

A I stated to Mr. Condon that I wanted to speak to him as cop to cop and I explained to him that I was not from the Internal Affairs Unit, that I was a Field Detective working on crime and I was not out to trap other cops. I wanted to offer him and opportunity to testify for the Government in this case. I said to him that I would speak to the Federal Attorney and try and do the best I could for him.

I believe Mr. Bollella stated to me:

"Well, what can you do for me about the job?"

I said to him that I would bring it to the attention of his superior officers if he cooperated with the Government. That I believe -- I can't recall too much more of the conversation, except that Mr. Bollella towards the end of our conversation said "I can't do it, I can't do it."

Q Did he give you a reason why he said he can't

do it?

A Yes, he did.

Q What did he tell you?

A He said "I'd rather be alive in jail than dead on the street."

Q Did he any time during this conversation tell you that he couldn't testify to something that would be a lie?

A No sir, he did not.

Q Did he deny his guilt as charged in the indictment?

A No sir, he did not.

MR. RYAN: No further questions.

CROSS-EXAMINATION

BY MR. KLEIN:

Q You say when you participated in the arrest and searched the apartment, you were only looking for papers which had Dennis Condon's name on it; is that right?

A No, I did not state that I was only looking for papers with Dennis Condon's name on it.

Q What did you say?

A I said I had previous knowledge of a Dennis Condon and I was looking for papers there, but that wasn't the only thing.

A I assume so, I don't know for a fact.

Q I show you a letter here dated February 9th, written by Mr. Bollella to Mr. Condon.

Now, do I have a photostatic copy of that, Mr. Ryan -- did you find a photostatic copy of this letter which is Exhibit 3?

A Yes, I did. I found a photostatic copy.

Q This one came from Mr. Condon?

A I don't know where that came from.

Q There was a photostatic copy of this letter found in the premises?

A Yes, sir.

Q When you drove Mr. Bollella to F.B.I. Headquarters, in your conversation with him -- you did have a conversation with him?

A Yes, I did.

Q Did you tell him that Mr. Schlam had a message for him?

A Not in those many words, no.

Q Did you tell him that Mr. Schlam wanted to talk to him?

A Yes, and I also stated to Mr. Bollella that I thought he should think over what he has been doing in the last six months.

Q Just before you got to the stand here, did you listen to the colloquy in front of the Judge in the absence of the jury?

A Yes, I did.

Q Did there come a time when you went into the anteroom over there?

A Yes.

Q Was Mr. Schlam present in the courtroom at the time this colloquy took place about your proposed testimony?

A Yes, he was.

Q Did Mr. Schlam then come out and discuss it with you in the anteroom?

A No, I don't believe he did.

Q Did you talk to Mr. Schlam in the anteroom during this colloquy?

A Not that I know of, no.

Q Is it your testimony that Mr. Schlam remained in the courtroom and you went outside in the anteroom?

A That's correct.

Q Now, let's get down to this Blue Flame -- Burger Flame. Who was present there, Mr. Rossa your partner?

A Yes.

Q And Mr. Bollella?

A Yes.

Q And were you -- the three of you present durin the entire conversation?

A Yes, sir.

Q And did one of you -- by the way, you knew -- this was September 19th; is that right?

A Yes, sir.

Q And before calling Mr. Bollella and asking him to meet you, were you informed that Mr. Bollella had met with Mr. Condon and Agent Berry at this building here?

A No sir, I was not.

Q You were not aware of that meeting?

A No sir I was not.

Q Did you know that Mr. Bollella was already under indictment?

A Yes, sir.

Q Did you know that he had appeared by an attorney -- did you know that he had pleaded not guilty?

A Yes, sir.

Q Did you know that he had an attorney appear for him?

A I was present at the arraignment and I understood that Mr. Newman was just handling Mr. Bollella for the

arraignment. I did not know Mr. Bollella's lawyer.

Q Did you know he had a lawyer?

A I assumed that he did.

Q Nevertheless, you had a conversation with him in the absence of his attorney after he was indicted and after he retained a lawyer?

A That's correct.

Q Was a report made by either you or Mr. Rooney of this conversation that took place in the Burger Flame?

A Yes, there was.

Q Who made the report?

A Detective Rossa.

Q Did you make any report?

A No sir, I did not.

Q The only report we have of that conversation is the report made by Mr. Rossa; is that right?

A Yes, sir.

MR. KLEIN: I call for the report.

Q I show you Government's Exhibit 20 for identification and I ask you if that is the report that Mr. Rossa made of this conversation at the Burger Flame?

A Yes, sir.

Q And did you see the report before Mr. Rossa made it?

A Yes --

THE COURT: Wait a minute --

A (continuing) -- before he made it? I saw it after.

Q Did you discuss it with Mr. Rossa before he made it?

A Did I discuss his report?

Q Yes.

A Not his report, sir, no.

Q Did he tell you what he was going to put in the report?

A He typed it up and showed it to me.

Q To this day have you made any correction to this report?

A No, sir.

Q Is this report correct?

A Yes, sir.

MR. KLEIN: I would like to offer this report into evidence.

MR. RYAN: No objection.

THE COURT: All right, it will be received.

THE CLERK: Government's Exhibit 20 for identification is received in evidence as Defendant's Exhibit CC.

(So marked.)

MR. KLEIN: May I read this to the jury?

THE COURT: You may.

MR. KLEIN: This is a report made by Detective Samuel Rossa, Shield No. 1105, 11th B/L -- what's that?

THE WITNESS: Burlary and Larceny Squad.

MR. KLEIN: Mr. Rossa is your partner and he has been sitting at counsel table with you throughout the trial?

THE WITNESS: Yes, sir.

MR. KLEIN: This report is dated September 6th, 1972.

"Subject: Interview of Robert Bollella.

"One, the undersigned with Detective James Rooney, 2912, both of the 11th B/C Squad interviewed one Robert Bollella, a subject of this investigation.

"Two, this interview is conducted at the Burger Flame Restaurant located at Avenue U and Garritson Avenue this date at 11:30 hours. No results were obtained from this interview."

(Document shown to jury.)

MR. KLEIN: Your Honor, excuse me for a moment.

THE COURT: You do?

I was going to give the jury an instruction.

Would you want me to do that first, or do you want to proceed?

MR. LEWIS: Whatever you want.

THE COURT: Perhaps I ought to make it plain to them:

During this trial, ladies and gentlemen, I know you will recall from time to time I gave you some limiting instructions with respect to particular kinds of evidence that was permitted to come in.

Now, you have heard testimony here from this Police Officer regarding a statement made to him by the defendant Bollella alone in this restaurant in Sheepshead Bay. The purpose for admitting that statement is to show the state of mind of the defendant Bollella at the time he was talking to the Police Officers. It is not in any sense a statement that would be binding upon the other defendants in this case. I want to be sure you fully understand that.

First, as you will recall, it was made

after the indictment -- the arrest and indictment of Bollella, so it cannot be considered by you as the declaration of a co-Conspirator. A Conspiracy if it didn't end when the Government said it did back in December of 1971, has certainly come to an end by the time an arrest is made. It is not in furtherance of any ongoing Conspiracy.

Secondly, it is not in this sense, since it is a hearsay statement allegedly attributed to Bollella, it is not proof of the truth of anything.

You understand that?

It is explanatory of reasons or the state of mind of the defendant Bollella when he spoke to these Police Officers. It is for that limited purpose only that you consider it.

Go ahead, Mr. Lewis.

(continued on next page.)

CROSS EXAMINATION

BY MR. LEWIS:

Q Detective Rooney, you told us -- You stated to Mr. Bollella, "You can bring your lawyer along"; am I right?

A Yes.

Q Have you ever told a subject of investigation that, "I'd like to talk to you, and if you like, you can bring your lawyer along?"

A Yes, I have.

Q Isn't it the practice to say, "We are going to meet at your lawyer's office?"

A No, sir.

Q Did you ever tell a subject, "Bring your lawyer along, we are going to meet over at this restaurant and we will talk?"

A I usually say, "We will meet in the station house."

Q This was an unusual remark, bring your lawyer along and we will meet at the Burger Flame?"

A No, sir, because I was instructed to do so.

Q You were instructed by someone to call Bollella and tell him, "If you have a lawyer, bring your lawyer alone, and we will discuss matters at the Burger Flame," is that it?

A Essentially, yes, sir.

Q And you told us you saw this report that the jury is reading right now; am I right?

A Correct.

Q When you saw the report, after it was typed by your colleague, did you say to him -- say that the report is inconclusive -- that it hasn't the conversation that Bollella says, "I can't do it, I'd rather be alive in jail than dead in the street"?

A No.

Q You consider that an important facet of your conversation, didn't you?

A Not at this time, no.

Q No, not at that time, that a man said, "I'd rather than be dead in jail -- I'd rather go to jail than be dead in the streets"?

A No, sir.

Q You didn't consider that important?

A Not when typing up that report, no.

Q When did it become important to you, yesterday?

A No, sir.

MR. RYAN: Objection.

THE COURT: Yes, Mr. Lewis, please --

MR. LEWIS: All right, your Honor.

THE COURT: -- don't shout at the witness.

MR. LEWIS: I am sorry. I heard some other lawyers shout in this case. I won't mention names.

Q Did you ever tell that alleged statement to Mr. Schlam?

A I can't recall that I did, no, sir.

Q Did you ever tell the Assistant United States Attorney, Peter Schlam, about this meeting at the Burger Flame?

A Yes, sir.

Q At no time did you tell him what the conversation was?

A What the conversation was?

Q Yes.

A No, sir.

Q Didn't he say to you, you spoke to Bollella, what did Bollella say to you?

A Yes, sir.

Q And didn't you tell him that Bollella said, "I can't do it, I can't do it, I'd rather be alive in jail than dead in the streets"?

A What I said to Mr. Schlam --

Q Didn't you say --

THE COURT: Just a moment, let him answer it.

MR. LEWIS: I thought he answered it.

THE COURT: No.

A What I told Mr. Schlam was that Robert Bollella would not be a Government witness.

Q Did you tell him what Bollella said to you?

A Not that I recall, no.

Q Is your memory hazy?

A Is my memory hazy?

Q As to what you said to Mr. Schlam a year ago?

A No, I already said that I told him that Robert Bollella would not become a Government witness.

Q Your memory was hazy about half an hour ago, you didn't remember speaking to Mr. Schlam -- You said, "Not that I know of"?

A What I did say was Mr. Schlam did not follow me.

Q Didn't you say, "Not that I know of," when he asked you whether you spoke to Mr. Schlam in the other room?

A No.

Q You didn't say that?

A That's right.

Q Did you tell Mr. Ryan about this conversation in the Burger Flame?

A Yes.

Q When did you tell him?

A Could have been in March, could have been in June. I had many conversations.

Q Could have been yesterday, too?

A No, sir.

Q Could it have been Thursday?

A Excuse me?

Q Could it have been Thursday of last week?

A I have discussed this with Mr. Ryan on many occasions.

Q When was the last time?

A Lunchtime.

Q Today?

A Yes, sir.

Q When was the first time?

A Could have been March, or June 3rd.

Q What did you tell him in March?

A Just what I testified to, that we had a meeting with Mr. Bollella and we tried to convince him to be a Government witness, and that he said he couldn't do it -- couldn't possibly do it, and that he'd rather be alive in jail than dead in the streets.

Q And you told that to Mr. Ryan in March?

A Possibly, yes, sir.

Q Possibly?

A Possibly, yes.

Q And you also knew about that written statement that was prepared by your brother Officer that was turned over to us today, turned over to Mr. Ryan, rather, before the commencement of this trial?

A Yes, I knew about that report.

Q Did you ever say to Mr. Ryan, "You know, that report that was given to you is not a complete report -- the one that you are turning over to Mr. Bollella's lawyer?

A No, I didn't say that.

Q How many times would you say you told him that statement?

A How many times?

Q Yes.

A Just pure speculation, I would say at least three or four times.

Q There is no doubt that you spoke to him about it during the lunch hour?

A No doubt whatsoever.

Q And you know, do you not, that the first time defense counsel knew about that statement was when Mr. Ryan told it to us just a little while ago; am I right?

A I didn't get the first part.

MR. LEWIS: Would you please repeat it?

MR. RYAN: I object to relevancy.

MR. LEWIS: I think it is very relevant, your Honor.

THE COURT: I will allow it.

(Question read.)

A Yes, I believe you are correct.

MR. LEWIS: Thank you.

THE COURT: Anything else?

MR. NEWMAN: Good afternoon, Mr. Rooney.

THE WITNESS: Good afternoon.

(continued on next page.)

CROSS EXAMINATION

BY MR. NEWMAN:

Q Mr. Rooney, on the day that you told us about this meeting back in September of 1972, did you make any notes or memoranda?

A No, sir.

Q After you left that meeting, did you make any notes or memoranda as to the conversation?

A No, sir.

Q At that time did the Police Department have memo books?

A Yes, sir.

Q Did you make any notation in your memo book of either the meeting or the substance of the conversation, sir?

A To the best of my recollection, I made a notation of the meeting.

(continued on next page.)

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EK:GA
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Q Do you have that notation here with you today, sir?

A No, sir, I don't.

Q To your knowledge, sir, did your brother Detective -- Withdrawn.

Where were you and Rossa sitting at the time of this conversation?

A We were in a booth.

Q A booth in the restaurant?

A That is correct.

Q And according to your testimony, sir, you were there, Mr. Bollella was there, and your brother Detective, Detective Rossa?

A That is correct.

Q And I assume that the booths you were sitting in were right next to each other?

A Detective Rossa and I were on one side, and Mr. Bollella was on the other.

Q To your knowledge, sir, did Detective Rossa make any notes or memoranda concerning this conversation?

A To my knowledge, no, sir.

Q Now, sir, do you have that memo book covering that particular day with you here today, sir?

A No, sir, I don't.

Q To your knowledge, does Detective Rossa have that memo book with him here today?

A No, sir.

Q Now, do you know, as you sit there now, without looking at Exhibit CC in evidence, what date this report was made?

A Yes, sir, I do.

Q What date was it made, sir?

A 9/6/72.

Q What was the date of the meeting, sir?

A 9/6/72.

Q That is the very same day when all of this was fresh in your mind that this report was made, sir?

A That is correct.

Q Now, you have looked at this report a number of times; have you not, sir?

A That is correct.

Q As a matter of fact, this is an official report?

A Yes, sir, it is.

Q It is called a DD5; is it not?

A That is correct.

Q Now, sir, this idea of your meeting with the defendant in a case, would you consider that unusual?

A Yes, sir, I do.

Q Isn't it a fact, sir, that at that time there was a report form required in the Police Department of the City of New York called an Unusual Occurrence Report?

A Yes, sir, there is.

Q Did you, sir, in connection with that interview fill out an Unusual Occurrence Report?

A No, sir, I did not.

Q To your knowledge, sir, did Detective Rossa fil out an Unusual Occurrence Report on that day in question?

A No, sir.

Q Now, at that time, sir, how long had you been a Detective in the City of New York Police Department?

A Nine years.

Q And to your knowledge, sir, on that day in question, how long had Detective Rossa been a Detective in th City of New York Police Department?

A As a Detective, I don't know, but I believe he had nineteen years as a Police Officer.

Q Am I correct, sir, that neither of you filled out an Unusual Occurrence Report, and to your knowledge, neither of you made an entry of that conversation in your memorandum book?

A As to the conversation?

Q Yes, sir.

A No, sir.

Q Now, am I correct, sir, in your experience as a Detective, would that statement, if made by Mr. Bollella to you, be important?

A That statement, yes, sir.

Q Would it be significant?

A Yes, sir.

Q Would it be unusual?

A Not for an unusual occurrence report, sir.

Q Would it warrant being written down in the memorandum book, sir, in your experience as a Detective?

A No, sir.

Q Would it warrant being put into an official Police Department Report?

A No, sir.

Q In other words, you wouldn't consider it significant that a possible witness thought he was in dangered, and you would think it is significant enough to put it into a report: Is that your testimony here today?

A I didn't put them into my report, or memo book.

Q You didn't think it significant -- Withdrawn.

Prior to your going to meet with Mr. Bollella, I think you said you had a conversation and instructions from somebody?

A That is correct, sir.

Q Were those instructions and conversations from Mr. Schlam?

A No, sir.

Q Did you have any conversation before you interviewed Mr. Bollella with Mr. Schlam?

A That is correct.

Q And is Mr. Schlam the Assistant United States Attorney who at that time was prosecuting this case?

A Yes, sir.

Q Did you come back and report to Mr. Schlam the product of that conversation?

A I did not come back.

Q Did you think it significant to tell him that a possible witness is in fear, and that is why he wouldn't testify?

A No, sir.

Q You didn't think that important?

A I testified that I told Mr. Schlam that Robert Bollella would not be a Government witness.

Q But didn't you tell him the reason is that was what you are telling us?

A That's all I told him, sir.

Q But you didn't -- Just answer my question --

A I'm sorry, I didn't understand your question.

Q You didn't tell him the reason that you are telling us about here today, did you?

A No.

Q You didn't think it important enough to tell him the reason?

A No, sir.

Q Now, in the day in question, you told us about arresting Mr. Bollella; is that right, sir?

A That is correct.

Q To your knowledge, did anybody have an arrest warrant that day for Mr. Bollella?

A To my knowledge, I believe, yes, sir, I believe they did.

Q An arrest warrant was executed that day, was it not?

A Yes, sir.

Q And that search that you are telling us about, and the seizure was made incidental to the execution of that arrest warrant; isn't that so?

A Er -- To my knowledge, Mr. Bollella himself signed permission to search.

Q But it was while you were executing that arrest warrant that he gave you the permission, and you made the search; isn't that so?

A Yes, sir, yes, sir.

Q All of these papers that you took, did you walk out with them in your hands loose?

A No, sir, I placed the revolvers and papers in a brown paper bag.

Q In a brown paper bag?

A Yes, sir.

Q Were you here earlier when Mr. Bollella testified that somebody walked out with a brown paper bag?

A Yes, he testified that I did.

Q That you did.

Very well, sir.

A Yes, sir.

Q Do you know how many papers you had in that brown paper bag?

A No, I don't.

Q Did you ever count them?

A No, sir, I did not.

Q Did you ever inventory them?

A No, sir, I did not.

Q Did you ever make a list of them?

A No, sir, I did not.

Q Now, sir, you told us about a conversation that Mr. Bollella had with you in which he inquired concerning his

job; is that right?

A That is correct.

Q He asked you whether you could save his job?

A What could I do for him about the job?

Q What did you say to him?

A I said that I would inform his superiors of his cooperation.

Q In other words, are you telling us that if Mr. Bollella had confessed that day to participating in the burglary, you would inform his superiors, and you would be able to save his job?

A I said I would if Mr. Bollella had agreed to become a Govennment witness and testify to this case, I would make those facts known to his superiors in the Department.

Q Now, in your experience as a Detective for nine years, had you ever heard of a Detective confessing to burglaries and remaining a Detective?

A Could you repeat that again, please?

Q Yes, sir.

MR. NEWMAN: Mr. Stenographer, would you be kind enough to repeat that to the witness?

(The Reporter repeated the question.)

A Not burglaries.

MR. NEWMAN: I have no further questions of this witness.

Q Other crimes?

A Yes, sir.

Q All right --

MR. HOCHHEISER: I have been --

MR. RYAN: I am sorry.

CROSS-EXAMINATION

BY MR. HOCHHEISER:

Q Detective Rooney, you are assigned to what is now known as the Burglary and Larceny Squad; is that right?

A Yes, sir.

Q And the normal function of a detective in the Burglary and Larceny Squad would be to catch, as it is said, and investigate numerous burglaries and larcenies; is that correct?

A That is correct, sir.

Q And as a matter of fact you have not been assigned to those regular duties throughout the duration of this trial; is that right?

A That is correct, sir.

Q You have been specially assigned to this case; is this correct?

A That is correct.

Q And is there a special request and/or a special order from some authority in the Police Department temporarily

assigning you to work with Mr. Ryan?

A Yes, sir, there is.

Q And how long have you been specially assigned either to Mr. Ryan or to some other assistant in the United States Attorney's Office?

A On this trial since June 2nd -- June 3rd, I'm sorry, the prior day.

Q On June 2nd?

A Yes, sir.

Q And prior to that were you specially assigned in connection with other aspects of the investigation of the burglaries in which Denisch and Condon were involved?

A I'm sorry, I'm sorry, I didn't understand.

Q Let me rephrase it.

We can call it the Denisch and Condon case, all right, this one --

MR. RYAN: Objection.

Q Let me rephrase it.

THE COURT: Just a moment.

This is certainly beyond the scope of the direct examination.

MR. HOCHHEISER: Well, your Honor --

THE COURT: It has nothing to do with the reason why this witness is on the stand.

THE COURT: Thank you, Mr. Klein, for your interest in the preservation of evidence.

MR. HOCHHEISER: Thank you very much.

Your Honor, in view of your Honor's ruling and I presume with an exception to myself, then I have no further questions.

THE COURT: All right.

Anybody else?

REDIRECT EXAMINATION

BY MR. RYAN:

Q What was the purpose of making this report, Government's Exhibit -- or Defendant's Exhibit CC?

A To try to convince Robert Bollella to become a Government witness.

MR. LEWIS: That is not responsive, this making of a report.

MR. KLEIN: That was not responsive to the question.

MR. RYAN: Let me see, my question was --

THE COURT: I think it was misunderstood.

MR. RYAN: Misunderstood.

THE WITNESS: I'm sorry, sir, I'm sorry, sir.

BY MR. RYAN:

Q What was the purpose of the meeting with Mr.

Bollella, to obtain evidence against him?

MR. KLEIN: Objection as leading.

Q What was the purpose of the meeting with Mr. Bollella at the Burger Flame?

THE COURT: I will permit that.

I don't think I could consider it leading.

Go ahead.

THE WITNESS: Which question.

THE COURT: Well --

Mr. Karr, will you read the question?

MR. RYAN: I will rephrase --

THE COURT: Just a minute, Mr. Ryan.

(At this point the reporter repeated three questions and the answers given.)

THE WITNESS: To try to, to try and convince Robert Bollella to become a Government witness.

BY MR. RYAN:

Q What was the purpose of the report, Defendant's Exhibit CC?

A To state that we had met Robert Bollella at the Burger Flame.

Q And what is an unusual occurrence report?

A An unusual occurrence report is made out by the detective who catches a crime, only a crime.

MR. RYAN: No further questions.

RECROSS-EXAMINATION

BY MR. KLEIN:

Q Mr. Rooney, is it a crime --

A Yes, sir.

Q (continuing) to threaten a Government witness?

A To threaten a Government witness?

Q Yes.

A I imagine so, yes, sir.

(Mr. Klein then sat down at counsel table and then got up.)

BY MR. KLEIN:

Q You didn't make any notation in that report (indicating), did you?

A No, sir.

THE COURT: Anything else.

MR. RYAN: No, no further questions.

THE COURT: All right.

Detective Rooney, you may step down.

THE WITNESS: Yes, sir.

(The witness was excused.)

THE COURT: Well now --

MR. NEWMAN: I am sorry, I sort of anticipated.

277A

THE CLERK: State your full name for the record, please.

THE WITNESS: Richard K. Berry.

R I C H A R D K. B E R R Y , called as a witness herein, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. RYAN:

Q Would you tell us your occupation?

A Special Agent with the FBI.

Q How long have you been with the FBI?

A Approximately ten years.

Q And are you assigned to any particular squad?

A The Bank Robbery Squad.

Q Did you have occasion to participate in an investigation into the Manufacturers Hanover Bank burglary of December 12, '71?

A Yes, I did.

Q Did there come a time if you recall when a Grand Jury returned an indictment in that case?

A Yes.

Q That was on July 19, 1972 or about that date,

correct?

A Correct.

Q Now, after the indictment, did there come a time when you had a conversation with the defendant Bollella?

A Yes.

Q How long after July 19, did the conversation take place, to the best of your recollection?

A Approximately two or three days.

Q And was the conversation person to person or otherwise?

A It was otherwise.

Q How did you have the conversation -- telephone --

MR. LEWIS: I object to this, Judge. Let the witness answer without any prompting.

THE COURT: Let the witness use his recollection of how it occurred.

BY MR. RYAN:

Q How did the conversation occur?

A It occurred in the U. S. Attorney's Office in this building.

Q And tell us what happened.

A Mr. Bollella came to the office of Mr. Schlam, an

Assistant U. S. Attorney in this District and present at the time was Dennis Condon, who had also been arrested in this case.

Q Then what happened?

A Well, when Mr. Bollella first came in he came into, I believe, Mr. Schlam's office -- outer office and I searched him and then he went in to talk with Dennis Condon in Mr. Schlam's office.

Q Then what happened?

A A short time after -- a very short time after that he came out and requested to go to another room or another office and then I took him -- he and Dennis Condon, across the hall to the Conference Room which I had ascertained was empty and he and Dennis Condon went in and I left the room.

Q Did there come a time when you went back to the room?

A Yes.

Q How long after?

A Approximately a half hour or so.

Q What happened when you returned?

A When I went back into the room Mr. Bollella was pacing back and forth the length of the Conference Room and I asked what he was going to do.

A His reply was, I don't know -- I just don't know. Then he asked if he could leave and go to the Men's Room, which he did.

Q Then what happened?

A A little while later he returned to the Conference Room --

Q About how long later?

A 15 to 20 minutes.

Q Then what happened?

A He came back into the Conference Room and again I asked what are you going to do and he said I don't know -- I don't know. A couple of minutes later he asked if he could leave and I said certainly and he left the office.

Q At any time during these events that you just testified to, did Mr. Bollella ever tell you that he couldn't do it, that he knew it was a lie and he couldn't testify --

MR. KLEIN: Let the witness testify, please.

THE COURT: Wait a minute.

MR. KLEIN: Let him ask him what the conversation was.

THE COURT: I think this witness has been asked certain questions and related what the conversation was.

Now, are you reading from testimony --

MR. RYAN: I will have to find the page. I have my notes.

MR. NEWMAN: May I direct the Court's attention to this aspect of it. If I remember the testimony of Mr. Bollella it was that this conversation-- these statements were not made to this agent but made to Mr. Condon and I think the predicate of the question, most respectfully, is unfair --

THE COURT: Let's see what the transcript does say.

MR. NEWMAN: Yes, sir.

MR. RYAN: Page 2832.

THE COURT: Before you state what it is, take a look at the page.

MR. NEWMAN: I don't have the minutes --

MR. RYAN: Page 2834, line 22.

THE COURT: Is this supposed to be a statement to Agent Berry?

MR. RYAN: This is the defendant Bollella's testimony about the statements to MR. Berry at the Conference Room in the U. S. Attorney's office.

department would be the Attorney General of the U. S.?

A Yes.

Q Who was the Attorney General at the time of this conversation?

A I don't recall.

MR. RYAN: Objection.

THE COURT: What difference does it make, Mr. Klein? There was one.

MR.KLEIN: That's right.

BY MR. KLEIN:

Q You still say that room was not bugged?

MR. RYAN: Objection.

THE COURT: He said it, Mr. Klein. The question is argumentative.

Q Was any report made -- did anybody overhear what was said inthe room between the two --

A Just the two individuals?

Q Did you have your ear to the door?

A No, sir.

Q Could anyone overhear from the outside?

A Not that I know of.

Q Was any report made of this conversation between Mr. Bollella and Mr. Condon?

A No, sir.

THE COURT: All right. Go ahead.

BY MR. RYAN:

Q Did MR. Bollella tell you he couldn't do it, he knew it was a lie and he couldn't testify against people and implicate others just to help the Government out or anything to that effect?

A He never said anything like that.

MR. RYAN: No further questions.

CROSS-EXAMINATION

xxxxxx BY MR. KLEIN:

Q Agent Berry, at the time of this conversation in the office here, you knew, did you not, that -- that Mr. Bollella had already been arrested?

A Yes.

Q And you knew he had been arraigned?

A Yes.

Q And you knew an attorney had appeared for him?

A Yes.

Q You left Mr. Bollella and Mr. Condon together in a room?

A That's correct.

Q Was that room bugged?

A No, it was not.

Q You worked at that time -- the head of your

Q Did you ask Mr. Bollella to testify on behalf of the Government here?

A I asked Mr. Bollella if he would be a Government witness.

Q And he did say, "I can't do it, I can't do it"?

A Yes, sir.

Q And then he left?

A Then he asked to leave, yes.

Q Do you know how he came down to these offices, here?

A No, sir, I don't.

Q Did you know that a phone call was made to him to come down?

A I didn't know a phone call was made.

Q You came down here because Mr. Condon was here; is that right?

A That's correct.

Q Anybody tell you that Mr. Bollella was going to be here?

A Yes, sir, it was mentioned but I can't recall who mentioned that Mr. Bollella was coming.

MR. KLEIN: Mr. Ryan, would you concede the Government made the telephone call to Mr. Bollella?

MR. RYAN: Sure.

Q Did Dennis Condon tell you or suggest to you and Agent Small that Robert Bollella would be the kind of fellow who would turn over --

A That's correct.

Q --like a whale --

A Excuse me?

Q What did he mean by turn over?

A He would be the most likely of the defendants that would testify against the others.

MR. KLEIN: No further questions.

MR. LEWIS: I would just like to ask one question.

CROSS-EXAMINATION

BY MR. LEWIS:

Q Is it unusual for the FBI to bug a room when a defendant is engaged in conversation with somebody connected with the Government?

A Would you please repeat it?

MR. LEWIS: Yes.

(Record read.)

THE WITNESS: It's never been done to the best of my knowledge.

MR. LEWIS: Thank you.

Reel 3.

Well, you have specifics with respect to evidence there. I am going to instruct the jury as to when a conspiracy is formed, what its duration is in terms of the indictment --

MR. KLEIN: Are you telling the jury it is a very narrow and limited indictment on Count 1?

THE COURT: I am going to tell them the Government charges as the period of time, given the standard rule that the Government is not bound by the exact dates, but it must be satisfied beyond a reasonable doubt that the existence of the conspiracy was some time during the period alleged.

MR. KLEIN: Even if you believe Denisch's statement that he gave $5,000 of the proceeds of the Chase Manhattan burglary to Robert Bollella, this fact cannot be considered as proof that Robert Bollella either conspired or had possession of -- conspired to burglarize the Manufacturers Hanover or had possession of Manufacturers Hanover loot.

THE COURT: Let me hear that once again.

MR. KLEIN: Even if you believe Denisch's statement that some time in April 1972 he gave

$5,000 of the proceeds of the Chase Manhattan burglary to -- which was originally earmarked for Condon -- to Bollella, this fact cannot be considered as proof that Robert Bollella either conspired to burglarize the Manufactu[illegible] Hanover or had possession of Manufacturers Hanover loot.

THE COURT: As I understand, that is the unrelated burglary?

(continued next page)

MR. KLEIN: Your Honor said at this time you would let it in solely because the question had been asked of Mr. Denisch on the stand what he did with the difference in money, with all of the money that he had from all of these burglaries, and he said, I spent the rest of it, and Mr. Ryan was permitted to show that as part of the rest that was spent he gave $5,000 of the Chase Manhattan burglary to Bollella, which had been originally earmarked for Condon, and it came in on that theory, and we are being prejudiced, my client is being prejudiced because it is proof of another unrelated crime happening months and months later, after the termination of the conspiracy, and this came in in the case --

MR. RYAN: Well, we really offered it as to the relationship between Denisch and Bollella, to show the relationship. We didn't offer it as part of the conspiracy. It was offered to show the nature of the relationship between the Government's witness and the defendant Bollella.

MR. KLEIN: But, you see it is not a prior inconsistent statement --

THE COURT: Why don't you type that out

during lunch?

Are you near? Is your office near?

MR. KLEIN: No, sir.

THE COURT: Write it out on a sheet of paper for me and give it to me. Hand that to me.

MR. KLEIN: Yes.

The other thing I want to say is that the statement that Mr. Rooney attributed to Mr. Bollella at the Burger Flame was not to be deemed any admission on the part of Bollella but is merely offered for credibility and to show the state of mind, the reason why Bollella said he can't testify on behalf of the Government.

THE COURT: Well, I don't know, the Government I suppose would vote it a --

MR. RYAN: It is an implicit admission.

THE COURT: (Continuing) -- of greater substance than that.

I will make it clear that what was said binds only a particular defendant.

MR. KLEIN: I am the one that doesn't want to be bound by it.

THE COURT: I know, I know, but --

MR. RYAN: I don't know how we can tell

someone knowing that the goods were stolen from a hijacked truck buys them this year. If he knows they are stolen and they are found in his possession, he is guilty of a federal crime.

MR. KLEIN: The crime, but not the same crime, not having to do with hijacking.

THE COURT: No, no, the crime of possession of stolen goods.

MR. KLEIN: I agree, that is why I am saying as far as 4 is concerned I don't make that motion but --

THE COURT: I am sorry, I misunderstood you. I thought you were saying --

MR. KLEIN: I am saying --

THE COURT: (Continuing) 4 is the substantive count of knowing receipt of monies taken from the bank.

MR. KLEIN: That starts with alleged conversations after the burglary with Denisch, Condon and Bollella. That 4 has nothing to do with Count 1.

THE COURT: Right, but of course actually it doesn't appear to me that there is any proof, direct proof of his receipt of funds --

MR. KLEIN: There is no proof --

THE COURT: So that may be a weakness in the Government's case, and I will reserve decision on your motion to dismiss that.

MR. KLEIN: All right.

I move on all the other grounds, of course, that we are entitled to.

THE COURT: Mr. Sonenshine?

MR. SONENSHINE: If the Court please:

At this time I respectfully renew all motions previously made on behalf of my client or any other motion which is joined, and I furthermore move for the dismissal of the indictment or for a judgment of acquittal now at the end of the Government's case, or rather at the end of the entire case upon the grounds that the evidence adduced by the Government against the Defendant Montello is insufficient in law either to warrant its submission to a jury or to establish guilt beyond a reasonable doubt and I therefore move for a judgment of acquittal as well, if your Honor please.

THE COURT: I will deny that motion.

MR. SONENSHINE: Exception.

RE. MOTION TO VACATE 2255



THE CLERK: Criminal cause for sentencing, United States of America versus Robert George Bollella.

THE COURT: I have received Mr. Klein's motion to vacate and set aside the judgment of conviction which was supplemented today by a memorandum and I received today Mr. Ryan's memorandum on behalf of the government opposing that motion.

I must say that after studying the motion and the record I do find there is a substantial question presented here that I cannot decide this afternoon and it would be of aid to me if both sides would submit any further search they can.

I was going to suggest that we put it over for one more week if that is agreeable.

MR. KLEIN: Would Mr. Ryan have objection for an additional week? I have heavy paper work to get out and I would neglect one or the other.

THE COURT: The Court has no objection, certainly.

One more week, in any event, would put it over until Columbus Day which is a holiday.

We will put it on for October 15. That might even be of assistance to the government because of its many obligations too, but I will tell you what is troubling me about the situation with respect to the defendant Bollella in the light of Mr. Klein's motion.

We don't see it exactly eye to eye but basically, I see a substantial question in this way: Recognizing, as the government has pointed out in its memorandum, that there is testimony by Condon and Denisch as to conversations on a face to face basis with this defendant regarding receipt of what they call "their share of the loot" from him and assuming that that implies that he did in fact get what he gave them from somebody who was actually connected with the bank robbery or at least holding money -- bank burglary , I am sorry -- or at least holding such money -- I am bothered by the fact that there was hearsay testimony admitted with respect to statements made at Lou Montello's house the morning that they drove out --

MR. RYAN: I understand --

THE COURT: And what I find missing in

the record is any instructions by the Court that calls to the jury's attention that hearsay testimoney which might be admissible with respect to this defendant's participation in the conspiracy of which the jury acquitted him, could not be utilized against him on substantive counts and the missing evidence here, at least, it seems missing in part, is that, assuming the truth of what Condon and Denisch state, which the Court has to do in the light of jury's verdict, there is still the further question that was raised in Mr. Klein's memorandum as to whether that exchanged passing off of funds as a conduit, was fairly embraced within count four which charged him, the defendant Bollella and the defendant Louis Montello with being the receipients of a share of the loot.

Now, that is the difference I see between a charge saying in count four "The two of you together got fourteen thousand dollars as your share of the loot." That seems to be a fair summation of what that count charged.

There is the other aspect of it which is that is was testified to that he acted as a conduit to transfer funds from the central keeper

of the loot to these two for the special reasons testified to which means he did not keep it himself but acted as a conduit.

Now, even assuming that is true, does that not raise a serious and perhaps fatal variance between count four as charged and the proof in the case?

MR. RYAN: Assuming that, I call your Honor's attention to Wright on federal practice, section 516 which in effect says that a variance is no ground for setting aside a verdict unless a substantial right of the defendant to any of the charges against him would be prejudiced.

It also points out, that the Appellate Court is reluctant to reverse for a claimed variance not objected to at trial.

In addition, there is a recent -- not recent -- I have October 26, 1971 and I will get the regular citation; U.S. against Silverman, dealing with a variance and what effect does it have on the verdict.

We will pursue the variance question and the effect of the hearsay testimony but point out that our memorandum submitted shows the

evidence of the non-hearsay testimony; the defendant's own conversations.

THE COURT: I understand but it is not just the character of the testimony but the thrust of the testimony. I agree with you that to the extent that the two government witnesses whom the jury believed, said "We met with the defendant Bolleila. We discussed the way the job went. He said to us 'I will give you the money whenever you want and I will keep a record of it" that was something the jury could determine if the charge had been that -- if it could be fairly said that that is what count four charged; that he served as a conduit for the other conspirators to funnel their shares to them. But count four doesn't really read that way. It says that he and Lou Montello each received a share and there is a difference, it seems to me, in the thrust.

There is one third point, beside the variance, and that is, you may recall, that I let in testimony that late in April of 1972, I believe it was testimony by Mr. Denisch, that he paid five thousand dollars out of an unrelated bank

burglary, the Chase Manhattan job. I recognize that this stemmed from cross examination by counsel and may well have been permissible in a sense but on the other hand, it was objected to and at the time I overruled the objection but there is a problem in my mind as to whether that, which by its tendency to show a propensity by the defendant to commit such crime; namely, to take five thousand dollars that he knew to be stolen, whether that deprived him of a fair consideration of what was done with respect to the counts with which he was actually charged.

MR. RYAN: Of course, on that, it was not only relevant to the cross examination developed by the defense but also relevant to the relationship between Denisch and the defendant. Here was a subsequent similar act.

THE COURT: What I am trying to say is this: We are no longer talking about the conspiracy. This defendant was acquitted of a conspiracy count by the jury for reasons they believe sufficient in the light of the instructions given by the Court. It was for them to determine where or when that conspiracy was, in their view,

ended and over with.

We are talking now solely about the jury's finding of this defendant guilty on count four. What did the five thousand dollar payment in April of 1972 have to do with count four? That is really the question.

MR. RYAN: Of course we are viewing it from hindsight --

THE COURT: I understand but we are viewing it from motions raised which attack, in a certain sense, the fairness of allowing that evidence to be considered by the jury on count four, which in a way may question whether my instructions to the jury were adequate on that count. But that has nothing to do with the variance and the thrust of the evidence and the thrust of the charge.

So, in the meantime-- and I am not going to ask you to submit elaborate briefs -- but if you have, as a result of your own research, anything that bears pretty specifically on those points it would be most helpful to the Court.

MR. RYAN: Surely.

THE COURT: So I will adjourn this to

October 15 to give you time to submit whatever you may have.

MR. KLEIN: Will that be at four p.m., your Honor?

THE COURT: Yes, if that is an agreeable time.

MR. RYAN: Surely.

THE COURT: As I say, I have to view the question as a substantial one.

MR. RYAN: In that event, we will be more than happy to supply the appropriate help we can offer.

THE COURT: Mr. Klein, did you have your own copy of the transcript at the trial?

MR. KLEIN: No, but Mr. Hochheiser loaned me his copy. The only thing that is missing is the government's opening.

THE COURT: I ask because some of the Court's copies have disappeared from the court file and I have had to borrow the government's copy. I don't ask you to supply it. I was just wondering if by perchance in the hustle and bustle of gathering everything up someone walked off with the Court's transcript. You have no duplicates?

RE. MOTION TO VACATE

THE CLERK: United States v. Robert George Bollella.

MR. KLEIN: Good afternoon, your Honor.

THE COURT: I am sorry to have kept you waiting. I had a three-judge court that I didn't count on running so long. It was much longer than I was told it would be.

Now, I have received your various briefs and basically the difficulty that I am having with the question involved here is why do you say that the testimony of the two accomplices with respect to their direct conversation with your client beginning I think the very day after this bank burglary was supposed to have taken place isn't sufficient to satisfy a jury on a circumstantial basis that if they believe the testimony that they had conversations to the effect that Mr. Bollella told them that their statement that he heard about it that it was a good job the night before and the discussion they had with respect to giving them the money as they needed it and keeping a little book in which he would keep a record of these payments -- why isn't that enough to

satisfy Count 4?

MR. KLEIN: Because Count 4 charged Mr. Bollella with being a recipient together with Willy Montello with splitting a $14,000 share of the loot of the Manufacturers Hanover burglary between them.

THE COURT: You may read that into it. It is actual language and I grant you it named both Louis Montello and Mr. Bollella. As we know, Mr. Montello was severed out. For all practical purposes it was a charge that Mr. Bollella did willfully and unlawfully receive, conceal and have in his possession approximately $14,000.

MR. KLEIN: Yes.

THE COURT: Taken from the bank which they knew had been taken from the bank.

MR. KLEIN: The only way that could be understood in plain language to a jury could only have been that Louis and Mr. Bollella, I say Louis is necessary, it says on or about December 14th, the only money that he got on or about December 14th or was supposed to get was a share of the loot because a conversation

took place at Louis' house on the night of the burglary and Mr. Bollella was absent. And Louis said Mr. Bollella is going to split one share. Everybody else got a $14,000 share and we are going to split. It refers to one share they were to get on December 14th. That is the plain reading of the language.

Now, it seems to me a charge of receiving is negated by proof of passing off as a conduit receiving monies and acting as a conduit which is passing to somebody else. It is negated. I think from the facts of this case it has to mean that that was the understanding. The only mention of $14,000 in the entire case I saw was that was the numerical decision of each one shares of the proceeds of Manufacturers Hanover and that was determined on the 13th or 14th.

And Count 4 has a specific date in there. Count 4 doesn't say that after the conspiracy was over in March or April that he would make payments, he would act as a conduit. How do you justify payment in March on or about March 14th --

THE COURT: On or about December 14th, you mean.

MR. KLEIN: What did I say? There were payments in March.

THE COURT: How can something that has gone so far as that -- as I remember the testimony, a number of these payments, according to both Condon and Denisch took place in the month of December.

MR. KLEIN: Around Christmastime.

THE COURT: Ranging from the 14th to the end of the month when Condon took off for Europe.

MR. KLEIN: The defense is different on both charges. It is true I came in late and there was no bill of particulars that I saw that indicated either way whether counsel before me was diligent in asking for a bill of particulars, but my defense was geared to the $14,000, to the share of the loot. That was my defense. All these other acts, as conduits, was coming in I thought on the ground of the conspiracy. Even though you left it for the jury to determine when the conspiracy was over. I believe you told the jury two things. You left

it for them to determine the length of the conspiracy, you stated they couldvery well find that it was part and parcel of the conspiracy. I think Mr. Ryan urged it, to make distribution of the proceeds not until the proceeds were distributed but they --

THE COURT: Well, except my comment on that would be it was clear that the jury acquitted Mr. Bollella of the charge of having agreed with the other co-conspirators to burglarize this bank. That is really what that conspiracy count was all about. It was true there were a number of overt acts alleged, the last of which was that in the week of December 12th Mr. Bollella and Denisch had a meeting during which they discussed the burglary. It wouldn't have been clear before the time whether that meant discussed planning for the bank burglary or discussed what happened after it. The point is I do agree with the jury acquitting Mr. Bollella of all implication in the conspiracy. But they did convict him on the basis of the substantive count of possession. Even if only of a momentary type. What I mean to say is

that in order to pay out Denisch and Condon he had the money. That is their testimony.

MR. KLEIN: He must have received it on or about December 14th.

THE COURT: There was even some testimony as I recall that some of the money received was burned. And from the conversations there was independent evidence by one of the bank officials that there was evidence of a fire in this particular safe deposit vault when they looked at it the next morning.

The problem I have, as I say, is it isn't for the Court to disagree with a jury finding. All I can try to determine is whether there was evidence even though it be circumstantial evidence sufficient for them to reach the conclusion if they believed the testimony of Condon and Denisch which they obviously did. That he had this money in his possession if only for the purpose of paying them off as they needed it. There is nothing in this count which I think would justify the construction you place on the count that it was limited entirely to his being a recipient

of a share. I can't say that might not have been in the mind of the Government or whoever drafted the indictment but on its face it simply charges in the language of the statute that he did receive, conceal, and have in his possession a certain amount of money at or about a certain date. I don't think the Government is tied down to an exact date even in substantive counts.

In other words, if it turns out to be on the 21st of December by the proof I don't think that would have been a fatal bearing here, or the amount of money turned out to be $7,000. I understand your basic contention very clearly which is you feel the variance consists in that you interpreted the count to mean that he was the recipient of the share of the loot and not a mere conduit by which shares of the loot passed by.

MR. KLEIN: Right.

THE COURT: I understand. I think there is one other thing. You make the statement he isn't charged with aiding and abetting. I have to charge because of the section 2 reference in this count. The aider and abettor statute,

that is to say if someone participates by an affirmative act in the commission of a crime, he makes himself liable as a principal.

MR. KLEIN: Right.

THE COURT: Now, even though Condon and Denisch by their own confession had been participants in the burglary of the bank as such, that is to say the breaking and entering and taking away, they were also guilty of a crime of receiving money taken away from that bank, too. And to the extent that a charge is made here under Section 2, I think it could be said that Mr. Bollella was a participant in aiding and abetting them to derive their shares of the loot.

MR. KLEIN: Is there a charge made under Count 2?

MR. RYAN: Yes.

THE COURT: A charge under Count 2 not against Mr. Bollella but against Condon.

MR. KLEIN: Mr. Bollella isn't charged with being a principal.

THE COURT: Condon pleaded guilty.

MR. RYAN: To the conspiracy count.

Your Honor, I think the last count reads clearly it is a violation of 2113 and Section 2. Embodied in the count --

THE COURT: I understand that.

MR. RYAN: He was clearly charged in the indictment with aiding and abetting in the commission of the crime.

THE COURT: And I so charged the jury.

MR. RYAN: That is correct.

THE COURT: On the aiding and abetting statute.

MR. RYAN: Absolutely.

MR. KLEIN: Your Honor, I feel very strongly. My defense was geared to receiving a share of the loot. And I presumed or assumed that Denisch and Condon's testimony about receiving money, the proceeds that Mr. Bollella had been offered on the conspiracy particularly because they had that colloquy and you even charged the jury that it is being received in evidence at this time against Mr. Bollella but it is not received in evidence as against the others. And at the time, I said, well, I would like you to charge it is not to be received against

Mr. Bollella and everybody at the counsel table and your Honor also laughed and we went on. This is what I had in mind. It is not to be received against him on the conspiracy. What your Honor did on that instruction or ruling was naturally any direct statement made to a conspirator are binding on the conspiracy but not binding anybody else until they are shown to be conspirators and certainly not after the termination. You gave limiting instructions to everybody else but not to Mr. Bollella. I assume that testimony came in solely on the conspiracy.

THE COURT: But he was acquitted on this. If it was error it would be called harmless error.

MR. KLEIN: Now, we are using testimony that came in on the question of the conspiracy to justify the conviction on the substantive count.

THE COURT: The presence in the record, is that what you base your --

MR. KLEIN: Yes, that plus the fact that I definitely recall Mr. Ryan saying to the jury we will show Louis Montello -- or the shares will be $14,000 apiece and Mr. Bollella was to split one share of $14,000. This is what I thought the thrust

was. I cited a number of cases in my memorandum in which the charge reads one way and evidence of another way comes in and the courts hold it is not sufficient to base a verdict on. You can't have a conviction in a criminal case unless you have two items, one is a specific charge in an indictment or information and secondly you must have proof of that specific charge. You cannot add to or amend the charge in the indictment. The court can't and neither can the prosecution, by way of other evidence. Without a specific charge, no matter how much proof you have, you can't have a conviction. I guarantee you that the grand jury could if they had wanted to, they could have indicted Mr. Bollella for acting as a conduit in this case.

THE COURT: But I ask you this, if that were so I can't see this indictment reading any differently than it does because whether you act as a conduit in which you temporarily possess the money or act as a recipient the essential elements of the crime are one, that the money in fact was money that came from a bank that was taken from the bank with intent to steal it and the other element the person

who possesses it whether he received it at the end of the line or receives it as a conduit to pass it on to somebody else knows it is stolen. Because possession in that case is simply actually having your hands on it and the problem as I say is if they were being tried separately, apart from the conspiracy, I dare say the evidence that would be admissible against him would be the face to face conversations that Condon and Denisch claimed they had with him. And their account of having received money from him which they say he knew because he knew about the bank burglary. That is their statement, that he knew that. That is as far as I am aware. And that was -- there was no objection to the statement of this testimony, that I heard about your job last night, it is a good job, someone told me, good work you did. And the other thing was one of them said even some of the bills were burned that I received from him.

Now, the basic question is, is it sufficient to conclude along with other facts emerging from Mr. Bollella's direct testimony as to his acquaintance with the Montello family, with Louis Montello, and so forth, and even to some extent later in time

I know he wrote, I am not -- all I am saying is that there was corroborating evidence if one could call it that of a circumstantial character which adds up and would permit the jury to infer, as it apparently did, that he did have his hands on that bank money and he knew he had. Whether the amount of $14,000, whether it did occur on the 14th, I believe there was conversation the very next day about it according to Denisch in Ratigan's bar. As I say, I think I would have to conclude as a matter of sufficiency of evidence it is sufficient on a circumstantial basis to constitute at the very least satisfaction of the requirements of Section 2. If not of Section 2113c in and of itself.

MR. KLEIN: I agree the jury brought in a verdict based on the direct examination --

THE COURT: I am talking about the sufficiency of the evidence.

MR. KLEIN: I was misled. I think the plain import of the government's case as it started out -- to satisfy that count that the government had in mind was the fact Louis and Mr. Bollella were to split one $14,000 share and

that is the only way it can be read. I am saying that's the way this case opened. It opened on a basis of attempting to satisfy Count 4 by showing that Louis Montello and Mr. Bollella were to split a $14,000 share on or about the 14th. When that failed the government shifted position and hung its hat on the second peg for the first time. I have a case where the government tried to show fraud and couldn't and tried to show constructive fraud and the appellate court said that can't be done, that is a fatal variance. That is one of the cases I mentioned. I say this count is being rationalized by hindsight. Sure the grand jury could have meant that but we don't know what the grand jury meant. The thrust of the government's case -- it was the one $14,000 share to be split between Louis Montello and Robert Bollella. Plus the fact -- before this thing started this was conceived in error. Conception took place in Louis Montello's house when Louis said we're going to split one share. Mr. Bollella wasn't there. Your Honor gave a limiting instruction that this is not binding on Mr. Bollella insofar as the conspiracy is concerned until later on you

find that he is a member of the conspiracy. The jury knew he was charged in two counts, the substantive count as well. By directing the limiting instruction only to the conspiracy count it permits the jury to accept that statement as proof on the substantive count that he was to receive money from the burglary.

Then we go to the end of the case. I am skipping the middle part. We go to the end and we get a statement on redirect by Denisch, I believe, that he had given $5,000 of the loot of the five month subsequent burglary of the Chase Manhattan Bank to Mr. Bollella.

Now, we started the case with a statement that he shared in the proceeds and we end the case with a statement that he shared in some proceeds. That is to show propensity. I feel with all due respect it was taken erroneously. How can the jury bring in a really fair verdict and do justice to a defense on whether or not he received a share of the loot of the burglary at the Manufacturers Hanover Bank? He didn't get a fair trial on that count, your Honor. I don't want to keep belaboring it but it is unusual for

a court to sit three times on a sentencing. We didn't get to the sentence at all. We are discussing points of law and I am not making these up vainly.

THE COURT: As you say, because of the limiting instruction with respect to the hearsay conversation relating only to the conspiracy count, your contention is that that evidence limited only in that way was still there for the jury to consider when they came to this Count 4?

MR. KLEIN: Yes sir.

THE COURT: That is what you are saying --

MR. KLEIN: As a matter of fact, I would go further. The very fact you did give a limiting instruction as far as the conspiracy is concerned but didn't say anything about the substantive count would indicate that what you gave them implied or directed them to consider on the substantive count.

THE COURT: Then you say it was taken as to the other count. Of course I must say the other testimony came in in a rather peculiar way because it was on redirect of Denisch and its purpose as I remember was to elicit from him an

explanation of what he did with the proceeds of the later burglary.

Now, do you say I overruled your objection at that point?

(Continued on next page.)

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MR. KLEIN: Yes. I contend it was a subsequent crime. This permitted him to be convictedunder the Manufacturers burglary by proof of the Chase Manhattan burglary. That was to show a propensity towards participation in various bank burglaries. If he participated in that he probably did in this one. Even Clarence Darrow wouldn't have won that point. It is difficult and unfair. It is hard with extraneous items coming in like that. The probative weight is far outweighed by the prejudice by permitting that to come in. If I was sitting on a jury I think I would be influenced by it. He got $5,000 from the other one and here there was an agreement to split $14,000. To get $7,000 from this one. Between those two incidents how can the jury fairly consider the circumstances? There was too much extraneous matter in there, your Honor. It was prejudicial matter.

THE COURT: Suppose I hear from Mr. Ryan a minute. I was somewhat hampered in my consideration because of the loss of the record

2

for purpose of appeal. There was a remark in your opening statement where you characterize your case against Mr. Bollella in terms of his receiving shares.

MR. RYAN: I have before me page 229 of the opening statement.

THE COURT: What did you say?

MR. RYAN: "Mr. Bollella is the man who vouched for Condon and Denisch with the rest of these defendants. It was Mr. Bollella who was the link that got the team together. It was Mr. Bollella who wasn't at the scene of the burglary during the commission of the burglary, but it was Mr. Bollella, we intend to prove, who after the burglary got $7,500 for his efforts -- his efforts in assisting in the perpetuation of this burglary without anyone getting caught. And the evidence will come out as to what he did.

"Mr. Bollella at the time was a New York City policeman and he still is. He worked in the Chief Inspector's office. We intend to prove to you that Mr. Bollella at the time of this burglary, participating in the conspiracy in handling the money after the burglary, was

318A

not only a New York City policeman, but he was a close business associate with a Mr. Louis Montello...."

And then I talk about the relationship.

THE COURT: As part of the conspiracy of the handling of the money. It does raise a question, first of all, that the theory of Count 4 as stated in the opening was he was the recipient of a share of $7,000. In my judgment there was no competent proof of that, absolutely none. No competent proof. Hearsay evidence received for purposes of linking him to the conspiracy would not be competent to prove that he received a share of the loot. There is no competent proof of that. Absolutely not a scintilla.

MR. RYAN: I am at a loss.

THE COURT: Wait a minute. I am not talking about the other aspect we discussed at some length here, namely, the question of whether his handling of the money as was described in the testimony of Condon and Denisch would satisfy this Count 4. But my point is, if it was the Government's position

4

in its opening that Count 4 charged he was indeed in receipt of the share of the loot, $7,500 or $7,000, I don't believe you can point to a shred of evidence that would be competent to prove that other than the hearsay statement which wouldn't be competent in my judgment on the substantive count made by Denisch that on a morning he was out there Montello said he and Bollella would split $14,000.

MR. RYAN: We have to respectfully and vigorously disagree. That the meeting the night of the burglary where the proceeds were divided and was destined for Mr. Bollella was not competent evidence.

THE COURT: How could it be? How could it be? You can't prove a substantive charge by hearsay evidence under any circumstances that I can appreciate. I understand that hearsay evidence would be competent once a person's membership is established in a conspiracy but here the jury acquitted him of the conspiracy. And to the extent your opening describes his role as a participant in the conspiracy and the reward he received for carrying out that

role the jury did not accept the view that the conspiracy continued after the consummation of the burglary itself. As far as he was concerned. It was clear they had no difficulty on the evidence convicting the other defendants on the basis of the testimony of Condon and Denisch as actual accomplices in the commission of the burglary. That is something clearly the jury had every right to do because they had competent evidence.

The big question in this case, as I see it, is whether counsel is one, correct in his view that he accepted the Government's construction of this indictment as meaning that Bollella received a share of the loot as in effect an award for the role he played. On that, I say there is no competent evidence. But I do recognize as I discussed at length that there is circumstantial evidence with respect to Count 4 that would imply his having in some way had possession of the loot for purposes of distributing it to Denisch and Condon according to their testimony which the jury accepted. And I recognize that aspect of it, but I am

6

troubled by the possible rub-off effect of incompetent evidence for a fair trial and plus the effect of that other second payment alleged to have been made or which Denisch testified to from the totally unrelated bank-robbery four months later. So I do have that problem, too, which I find troubling from the standpoint of trying to decide whether the conviction should stand. In the present context.

I certainly have read your briefs on this. I am aware that when it comes to admitting other crimes, and as the Court pointed out in the Vario case which is probably one of the more recent decisions on that, it naturally depends on the trial judge's discretion and the Court pointed out such evidence would naturally be prejudicial to a defendant.

On the other hand, if it is related in a reasonable way to a particular crime charged, the trial judge must weigh the effect of possible prejudice against relevancy. And the Court states the rule in the Circuit as being that the introduction of another crime is if

such evidence is admissible only if it is substantially relevant to such other purpose than to prove criminal character. What you say is the purpose is as far as he is concerned other than proving his criminal character or criminal propensity to do such a thing as this --

MR. KLEIN: I say it was to prove propensity.

THE COURT: What other relevant purpose could it have? I understand it would be relevant on the issue of Denisch's credibility or the rehabilitation of Denisch who had been attacked by other defendants on his other bank burglaries and what he did with the money -- and that is how the evidence came out.

But the question is it had nothing to do in reality with Mr. Bollella except to the extent Denisch gave the answer he gave $5,000 to Bollella four months ago. Mr. Klein objected and I overruled the objection. In retrospect I have some doubts about the correctness of that ruling, at least in terms of not later at an appropriate time instructing the jury that that particular crime either

did or didn't have -- was something they can or could not, I will change that, consider. And I am -- I would like to have your statement aside from for rehabilitation of Denisch after cross-examination, your statement as to how it would with respect to Count 4 because I would have to agree with the Court here that such evidence would naturally be prejudicial to a defendant. And it would be admitted only if it had a substantial relevance to the crime with which he stands convicted here which is not conspiracy but the receipt of this money. And I say I am troubled by that. Perhaps there is something I overlooked in the record that you might point out.

MR. RYAN: It was relevant on our direct case.

THE COURT: On your direct case in what respect? Why would it be relevant on your direct case? Forgetting for the moment the rehabilitation. How would it be relevant as to the commission -- there is a bank burglary which occurred December 1971 -- how would it be relevant? First of all, the only other

participant in it that had any relationship to this case was Denisch. Right?

MR. RYAN: Right. I would like to have an opportunity to answer it fully.

THE COURT: All right.

MR. RYAN: First of all, the charge here -- the evidence with respect to the Manufacturers burglary -- Mr. Bollella dealt with Denisch in the possession and distribution of proceeds from the Manufacturers Hanover burglary. It would be relevant, No. 1, to show that as to his willingness and knowing felonious possession of the Manufacturers Hanover Bank proceeds, doling them out to Denisch subsequently, he was equally willing in the Chase Manhattan incident to accept burglary proceeds.

In addition--

THE COURT: It is that criminal propensity that the Court mentions. Because of the danger the jury concludes he committed a crime like that that he would commit one like this.

MR. RYAN: Secondly, you will recall there came a time when Mr. Bollella did not have any more Manufacturers Hanover Bank proceeds,

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he gave as a reason that Salvatore Montello had taken the money. I believe the reasons were given in April after --

THE COURT: Yes, I remember that testimony. Both Denisch and Condon testified to that. That's when they inquired about the further money that was coming to them. They received an answer from Mr. Bollella that Sonny had borrowed it for attorneys fees.

MR. RYAN: And shortly thereafter, after the Chase Manhattan burglary, it is Bollella who is asking and receives more money from Denisch, so he didn't have the money. He wouldn't be receiving the money from Denisch if he still had the proceeds.

THE COURT: I don't follow the logic of that. As regards Count Four in this case, I must say that I would like to have some more time to consider this. I don't think it is appropriate for me to impose sentence at this time as far as Mr. Bollella.

MR. RYAN: In connection with this hearing, your Honor, I would like to mark the Grand Jury minutes which were provided to defense counsel

at the opening of the case -- I would like to mark them both as Government's exhibits. Your Honor will read them and see that the indictment was not based on any absence of evidence as charged by Mr. Klein.

THE COURT: I understand that.

MR. KLEIN: I say even if you did present --

MR. RYAN: You had the minutes before the opening. I am trying to find the record of the inventory as to when they were turned over. All the information furnished to you show that it was a part of Mr. Bollella's function to dole out the proceeds.

MR. KLEIN: As part of the conspiracy.

MR. RYAN: You indicated that to a fare-thee-well. You indicated there was a loan transaction --

MR. KLEIN: That was all part of the conspiracy charged --

MR. RYAN: It was not limited to the conspiracy. If there was no conspiracy count in this indictment the evidence was perfectly competent.

MR. KLEIN: No, sir.

12

MR. RYAN: Your Honor, I call your attention to the Ruggiero and Annunziata cases, that even if there was no conspiracy count in this case the meeting at the division of the proceeds, where there was a discussion about how to handle Denisch's share and Condon's share and Mr. Bollella's share, it was admissible under several theories. One of which they had a joint interest in a common enterprise in concealing and distributing these monies to Denisch and Condon through Bollella. It was also admissible to show the conduct of Mr. Bollella, for example, the next night when he is having a conversation with Denisch about where Denisch said to him you have the money, and he said yes, when you want it I will give it to you.

If that is not brought out the Government would be unduly restricted and any jury unduly deprived of evidence, relevant evidence, that on the night before the other conspirators had destined that money to be handled by Mr. Bollella. Even if there was no conspiracy count in this indictment. And Judge Friendly goes on quite an expedition in citing the cases I have mentioned

13

that it was admissible on several theories. And the fact that we were proceeding on a conspiracy count which was included in the case does not mean that is the only ground we offer it as admissible --

THE COURT: I understand that. I understand that the accomplice testimony that Denisch and Condon with respect to declarations made to them by this defendant would in my judgment be admissible evidence provided it was sufficient to establish all the elements of the crime in question. And one of the things that I still wish to take a look at here -- I understand the rules to be each count of the indictment must be sufficient in and of itself, and I have to say that each of these counts, as I read them, two, three, and four, seem to be related to the count of conspiracy which detailed the whole course of events that the Government claimed was charged. The substantive count, however, being the breaking and taking away and receiving and possessing. But the difficulty, as I see it, with regard to this defendant, is his acquittal on all of those charges relating to the burglary

of the bank.

MR. RYAN: It was only one charge that was conspiracy.

THE COURT: I understand. He wasn't charged in Count Two.

MR. RYAN: To make it even clearer, his role in the burglary was doling out and distribution of funds thereafter for which he got $7500. The conspiracy count extended beyond two and three.

THE COURT: What I say to you is I understand or thought I understood the rule to be each count in an indictment was to be sufficient unto itself. That is to say, if this defendant is being charged here with being an accessory, an aider and abettor, in the accomplishment of the distribution of funds on a substantive basis, received them, possessed them and so forth; should not the whole transaction appear in that count? I am not certain of that.

MR. KLEIN: Your Honor, I have a case which says -- I don't know if it is very recent -- but the case says merely repeating the requirements of the statute is bad pleading, you must

show a factual basis for it.

THE COURT: What is peculiar about this case is the defendant is acquitted of the conspiracy count, isn't charged in the two substantive counts with which the conspiracy was concerned but is charged in a third count with receiving money stolen in a bank burglary which occurred. And I realized that the Government would take the position that it not only proved the conspiracy which involved five of the defendants other than this defendant, but it also proves that the other five defendants did in fact rob the bank. I understand that, but this defendant was -- it certainly would be the proof in this case this defendant took no part in either of these counts two and three. No part.

MR. RYAN: Correct.

THE COURT: So that what you are left with is simply the bare-bones statement that on a certain day he received X dollars which he knew to have been taken from this bank and which he knew to have been taken from this bank with the intention to steal it and that he knew that money was so taken.

Now, I am saying that when it comes to proving what did occur as far as he is concerned there had to be proof that he had the bank had been robbed, that he knew the money had been taken. The only question in my mind was the statement I heard about, "your job last night," or Sonny or somebody, I forget who it was, "Sonny told me something or I learned about it. It was a good job." Whether that is sufficient to link him or to provide that the knowledge as far as the substantive count is concerned that that particular bank was the one that was robbed, that he knew a lot of money was taken from it, and that he in fact when he talked to these men at various times and handled the money was indeed handling the money from that bank robbery.

MR. RYAN: Are you saying the jury could have found they thought it was a different burglary?

THE COURT: I am not saying that. As far as the sufficiency of the proof in this case, the competent admissible proof, being on a direct -- that is to say, admissible evidence against him, he was acquitted of the conspiracy.

He wasn't charged with entering the bank. He wasn't charged with taking money away from it. So that when you get down to the proof as against him, you only have the statement of Condon and Denisch plus as I say general proof that he knew who the Montellos were. General proof that he had had a business association with Louis Montello who was a defendant in this case and I don't think the jury would be permitted to speculate on Louis Montello's role because you only have the bare statements -- you have the hearsay proof which Mr. Klein is complaining about which wouldn't have been competent as to this defendant.

In my opinion the hearsay statement that Denisch heard Montello say to him, this man not being there, that wouldn't be in my judgment competent proof linking him to such a plan. The only thing you have is the inference that the jury could draw from Denisch's statement that I went to see Mr. Bollella and I asked him about my share of the money and he said I will take care of it and I will even keep a record of it. And in a couple of instances of payouts of the money, a sequence of dates.

The question in my mind is whether on that bare evidence that is satisfactory and sufficient proof for the jury to convict this defendant without having resorted as I say to evidence about a conspiracy and about crimes with which he wasn't charged, conspiracy of which he was acquitted on and about crimes with which he wasn't charged. That is the problem I am attempting to cope with.

(Continued on next page.)

MR. RYAN: If I were a juror I would have to conclude that the night after the burglary when Bollella said to Denisch: I heard about the job last night, I heard that Condon almost blew it.

And Denisch said to him: Do you have the money for us?

And Bollella says to Denisch, Yes, when do you want it? I will give it to you but you, Condon, they are very dissatisfied with your conduct and you'd better watch your spending and I am not going to give you the money so you can freely spend it and draw attention to yourself.

Now, if I was a juror I wouldn't be permitted to infer or even conclude as a reasonable person that Mr. Bollella's conduct that he was talking about it the night after the burglary was not --

THE COURT: But it is all based, as I say, on testimony by an accomplice that he made the admission that someone, I forget what the testimony was, I think it was Sonny, Sonny told him --

MR. RYAN: Lou told me that Denisch almost blew it.

THE COURT: Now --

MR. RYAN: Then Bollella handed out the burnt bill.

THE COURT: That is where the problem is. That's what I am trying to isolate here. That is his declaration. It is true that Denisch says that's what Lou told him.

Now, I understand that. I am not disputing that.

MR. RYAN: I want to clarify what the facts are.

THE COURT: What I say is, this is what makes the reference to the hearsay statement by Denisch concerning hearsay statement -- that is to say Denisch's hearsay statement which makes this in my opinion a problem from the standpoint of the admissibility of that kind of hearsay evidence in the proof of this substantive count.

MR. RYAN: Your Honor, Judge Friendly went to great length in this opinion. I think it is pertinent here to the admissibility of it.

Secondly, in the Rugiero opinion there was a meeting and the defendant Rugiero was not present and it was admitted on two grounds. That opinion also is cited in our memorandum and we ask you to look at it.

THE COURT: I will.

MR. RYAN: I am sure you will.

THE COURT: More pointedly in the light of our discussion here, I think we are focusing down on a really specific problem that I am having with this case aside from this and that is the prejudice of the April payment.

MR. KLEIN: And with the limiting instruction.

THE COURT: And the limiting instruction.

MR. KLEIN: I would like to point out two things: When the Government makes an opening that is like a bill of particulars. The Government is bound by it. I made appropriate objection. The Government made an opening. On the opening they clearly indicated what they meant by Count 4. They said we will show you under Count 4 Mr. Bollella would be the recipient of a $7,500 share of the proceeds

of the manufacturers burglary in consideration of having introduced the Montellos to Denisch and Condon. It is right in the opening. Mr. Ryan was gracious enough to read it. I say he is bound by the opening. This is what the Government had in mind. They can't change horses on Bollella in midstream and urge some other evidence which is entirely a different set of facts.

Secondly, whether or not Mr. Ryan -- I think the other gentleman, Mr. Schlam presented the matter to the Grand Jury, I don't care that they present this evidence of Condon that Bollella made payments to them over a period of time. Assuming they did. However, the Grand Jury didn't indict Mr. Bollella for that. They heard it all. The Grand Jury was asked to give an indictment. They brought in an indictment and the United States Attorney knows what he asked the Grand Jury to return. He said so in the opening. The indictment, Count 4, which is a separate indictment as far as I am concerned, was based solely on the shares that Bollella was to receive and I say that the other evidence

5

about payouts as to a conduit which came in under the conspiracy, regardless of how it came in, it certainly has nothing to do with the substantive count as charged as it was amplified by the opening which is the bill of particulars which sets forth the Government's intention.

MR. RYAN: As I understand your theory, Mr. Klein, the only thing we could have done in this case was to have Denisch on the stand, not discuss the division of the proceeds, and simply testify to the conversations had with Bollella in Rattigan's Bar. And then the same is true with Condon following the burglary. Is that it?

MR. KLEIN: As contained in your opening you restricted Count 4 solely to the receipt of a share of the proceeds of the loot for consideration in introducing the Montellos to Denisch and Condon.

You could have opened and said the proof we are going to show is that he acted as a conduit and passed the money.

MR. RYAN: Didn't I say that Bollella was charged with handling the money? Didn't you have the Grand Jury minutes?

6

THE COURT: The only thing is you said his role in the conspiracy --

MR. RYAN: There was a conspiracy count. Am I required to apart from the conspiracy count and Count 4 say we are going to prove that he handled the money?

MR. KLEIN: Yes. I would say it.

THE COURT: If, as I say, your proof of handling the money so called is really related to his role in the conspiracy and he is acquitted of the conspiracy and I think that is what creates the problem when you come to a substantive count.

MR. RYAN: I found a case where Judge Moore wrote a lengthy opinion on the subject. If the Court found there was insufficient evidence of a defendant's participation in the conspiracy as a matter of law and the jury couldn't consider it, and he was convicted on a substantive count, evidence on a conspiracy count prejudiced him because there was no sufficient evidence to conclude he was part of the conspiracy -- that wouldn't be --

THE COURT: I don't know. He was acquitted

7

of the conspiracy count.

MR. RYAN: Your Honor indicated quite clearly there was no dispute. The ambiguity of the count, Count 1 in your Honor's word, and the confusion created by the count was what troubled the jury because -- this jury was troubled by the fact the language in the count was to enter the bank, and as we discussed as lawyers before the case went to the jury the indictment alleged the conspiracy extended beyond the date of the burglary December 12th and during the week of December 12th which can't be considered anything but subsequent. The whole theory was the conspiracy, the intrical part of the conspiracy was not stopped when they walked out, but the distribution of funds to Condon and Denisch was --

THE COURT: The basic question, having acquitted him of the conspiracy charge which embraced that activity on his part may be, none the less convicted on the substantive count which embraces that same activity, and I understand that conspiracy is different from the substantive charge and it has been held in many

cases that it is possible to be acquitted of a conspiracy to rob a bank and still be convicted of the robbery.

MR. RYAN: And the contrary is true too. You can be acquitted of the conspiracy and convicted of the substantive crime.

THE COURT: I just said that.

MR. RYAN: He could be convicted of the conspiracy and acquitted on the other.

THE COURT: I suppose so. In this case we are dealing with a situation where there has been an acquittal on conspiracy as put to the jury that this defendant handled the funds --

MR. RYAN: Under your Honor's charge they had a reasonable doubt about the defendant Bollella. It didn't mean that they didn't feel there was sufficient evidence, they had a reasonable doubt. They were confused by the ambiguity in the indictment which would have been resolved if they said they conspired to enter the bank -- that I wish was in there because that was the way --

THE COURT: Well, this is all in retrospect.

MR. RYAN: Now, the jury came back and

they wanted to understand, they were confused by that conspiracy count and as reasonable people gave the defendant the benefit of the reasonable doubt. That doesn't mean that they didn't believe he received the proceeds from the burglary, that money that he was supposed to hand out. The question was even asked at Lou Montello's, what happens if you get caught with $30,000, what explanation can you give.

THE COURT: Are you construing Count 4 in effect a charge of aiding and abetting in a conspiracy for which he was acquitted? Is that what you are really saying?

MR. RYAN: I don't understand.

THE COURT: When you started to discuss what the jury might have found here in finding him guilty on Count 4, you say they could have had a reasonable doubt about his participation in the conspiracy for good sufficient reasons. There was no evidence that he actually took part in any of the meetings and actually took part in the burglary itself.

MR. RYAN: As charged.

THE COURT: Right.

10

But you say they might have found that he did take part eventually in doling out the money to get the money in the hands of the other two. The problem I have, that suggests that the count really is that he aided and abetted in the culmination of the conspiracy of which he was acquitted. I am not charging you with that --

MR. RYAN: I can tell you the answer is absolutely not. We do not charge people with aiding and abetting in a conspiracy. We charge with aiding and abetting and libel as a principal in the commission of substantive crime.

THE COURT: Now, the substantive crime charged here is, according to Mr. Klein, he got a share of the proceeds of this money because he has performed a valuable service in bringing this whole group together. That --

MR. RYAN: That is --

THE COURT: You say that the indictment should be supported and I expounded on that at length by the circumstantial evidence at the very least that he must have possessed this money because how else could he have paid it

11

out to these defendants.

MR. RYAN: Do they say he got Denisch and Condon's share but not his own?

MR. KLEIN: That is speculation. I don't see any basis for inferring he was paid anything.

MR. RYAN: Then we have to assume a New York City Police Officer assigned to the Chief Inspector's Office is in felonious possession of currency to be shared by Denisch and Condon and he is doing it out of the goodness of his heart but not for the $7,000.

THE COURT: Where is the competent proof?

MR. RYAN: Your Honor, I am back to again saying --

THE COURT: Hearsay.

MR. RYAN: Hearsay is admissable.

THE COURT: Not on a substantive basis, I can't say that. Not when the man is acquitted of the conspiracy. If he had been held in the conspiracy we wouldn't be talking about this case.

MR. RYAN: If you had dismissed the conspiracy count at the close of the case before going to the jury I would have urged that this evidence about this meeting and I would want

the Court to charge was perfectly admissable to be considered against Bollella because this was a common enterprise because it showed the background for which the man was destined. They could consider it in light of Bollella's own admission that they told me about the job last night -- I've got the money for you.

THE COURT: Well, as you know I entertained the motion, reserved decision and the jury answered it because I believe the question of the duration of the conspiracy was a question of fact for them to decide.

MR. RYAN: Yes. I would like to have this in evidence.

THE COURT: Yes, I would like to receive that.

MR. RYAN: Grand Jury Exhibits 1 and 2.

THE CLERK: Grand Jury?

MR. RYAN: I am sorry, Government's Exhibits 1 and 2.

THE CLERK: Grand Jury Minutes of Denisch received in evidence as Government's Exhibit 1.

Grand Jury Minutes of Dennis Condon received in evidence as Government's Exhibit 2.

THE COURT: By the way, I shouldn't have this one.

MR. RYAN: That is the original one.

THE COURT: Why isn't that in the file?

MR. RYAN: It was given to me in order to redact the indictment and I am returning it to the Court.

THE COURT: I am told there is no copy.

MR. RYAN: I found a lot of problems with the file.

The Grand Jury Minutes were given, I am reasonably certain, before the openings and I know this is my practice.

Now, the last thing I want to leave is this thought: Is Mr. Klein saying that his client was convicted of a different count? Of a different count then he was charged?

THE COURT: That he understood he was charged with.

MR. RYAN: We all know the purpose of the indictment --

THE COURT: And also that he was convicted of that crime on the basis of improperly received hearsay evidence. And secondly, on the

additional improperly received evidence of an unrelated crime which can't be attributed -- can't be considered as having substantial relevancy other than the question of his -- you might say propensity.

MR. RYAN: His relationship.

MR. KLEIN: I would like to recall something to your Honor's attention.

THE COURT: Is that an accurate statement of your contention?

MR. KLEIN: Yes. I would like to call your attention and Mr. Ryan's attention that when we were going over requests to charge I added a request on a 5x8 index card and I handed it up to the Court but that was the end of it. You still didn't charge that it dealt with the $5,000 --

THE COURT: But that card was found by the way. I think.

MR. KLEIN: I would like to offer that card as an exhibit because you said: Suppose you write that out, suppose you write it out. And I wrote it out on a 5x8 card.

THE COURT: I think I said I would consider it.

MR. KLEIN: Yes. However, apparently the consideration was negative because --

THE COURT: Right.

MR. KLEIN: You were silent with respect to the request.

THE COURT: Well, I don't know how the record stands with respect to whether you excepted to it.

MR. KLEIN: Yes, I excepted to the charge, whatever you didn't charge, yes.

That was only a renewal of my objection.

THE COURT: Incidentally --

MR. KLEIN: Do you have that card?

THE COURT: That card was found and I can't tell you at the moment whether it was -- I think it was in the Court file. But I just couldn't say. I know it exists. It has not been lost.

MR. KLEIN: I just want to recall that to your Honor's attention. Charging the jury that the $5,000 subsequent payment was no -- my recollection of the card is that contained a request to your Honor to charge the jury that the alleged receipt of the $5,000 from

Denisch's share of the subsequent Chase Manhattan burglary is no proof that Bollella participated in the receipt of any of the proceeds of the earlier Manufacturers Hanover burglary.

THE COURT: As I say, that card exists. I have seen it only recently. I am sure it is in the Court file.

MR. KLEIN: I would urge your failure to so charge left the jury with the right to feel there was a propensity --

THE COURT: I know. You made that point in your brief.

MR. KLEIN: What is your Honor's pleasure sir?

THE COURT: Why don't I leave it this way, I will get in touch with both of you. I will do this expeditiously and I will get in touch with you and we can agree on a convenient day.

MR. KLEIN: Goodnight, your Honor.

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DENIAL OF MOTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

-against- :

ROBERT BOLLELLA, :

Defendant. :

- - - - - - - - - - - - - - - - - -x

72 CR 951

MEMORANDUM AND ORDER

APPEARANCES:

EDWARD JOHN BOYD V, ESQ.
Acting United States Attorney,
Eastern District of New York
By JOSEPH W. RYAN, ESQ.
Assistant United States Attorney

IRWIN KLEIN, ESQ.
Attorney for Defendant

NEAHER, District Judge.

On Sunday night, December 12, 1971, a branch of the Manufacturers Hanover Trust Company at 81-20 Northern Boulevard, in the Borough of Queens, was burglarized and its night safe depository vault rifled of some $115,000 in currency. Eight persons were indicted for the crime including Robert Bollella, the defendant above named.[1] After a jury trial, five of the defendants were convicted of conspiracy (count 1) and substantive offenses of

entering the bank (count 2) and taking away the $115,000 (count 3). 18 U.S.C. §§2113(a) and (b) and 371. Their convictions were recently affirmed without opinion sub nom. United States v. Fasanella, 490 F.2d 1406 (2 Cir.), cert. denied, ___ U.S. ___ (1974).

Bollella, the sixth defendant tried and the only one to take the stand, was acquitted of the conspiracy charge but convicted of receiving, concealing and possessing some of the money taken from the bank during the burglary (count 4).[2] The status of that conviction has remained in abeyance pending the court's consideration of Bollella's post-trial motion to vacate and set it aside.

Bollella, now 29 years old, is a New York City police officer who has been suspended from duty pending the final outcome of this case. A number of high-ranking officers of the Police Department appeared as character witnesses and testified to his exemplary record. The jury had the benefit also of Bollella's own testimony depicting in quite different terms his relationships with defendant Salvatore ("Sonny") Montello, the leader of the burglary gang, and his brother Louis, and with Dennis Condon and Robert Denisch, the two co-conspirator witnesses

for the government whose testimony convicted him. Not unexpectedly, the government's cross-examination of Bollella also produced evidence upon which the jury could rely in judging whether or not he had served as a "conduit" for the distribution of installment shares of the bank loot by the Montellos to Denisch and Condon as the latter pair had testified.

Bollella's omnibus attack upon his conviction is rather disjointedly presented in a variety of contentions scattered throughout many documents.[3] As isolated by the court, these contentions are (1) the verdict was against the weight of the evidence; (2) there was a fatal variance between the proof and the indictment; (3) hearsay testimony was improperly admitted as against Bollella; (4) testimony as to an admission by Bollella, taken in violation of his Massiah rights, was improperly admitted; and (5) undue prejudice was created by the admission of testimony of a subsequent similar crime on Bollella's part. These contentions will be dealt with seriatim.

Sufficiency of the Evidence

The jury had before it ample evidence of Bollella's own declarations and actions and of his close

association with the Montellos and Denisch and Condon from which to find beyond a reasonable doubt that shortly after the burglary he did in fact come into possession of money he knew to be stolen from the bank, which he paid out to Denisch and Condon as their share of the loot. The reason for this conduit arrangement was made clear in the evidence.

The bank burglary succeeded largely because Denisch, then an employee of the Holmes Protective Agency and expert in the installation and repair of bank alarms, had been able to devise apparatus to circumvent the alarm system at the Manufacturers Hanover branch. Condon had formerly been a Holmes security guard who had turned jewelry store burglar but wanted to branch out into bank burglary. He had brought Denisch to the attention of Sonny Montello after Bollella had arranged for Condon to meet Sonny.

Immediately after the Manufacturers Hanover burglary all of the burglars except Condon had driven to Louis Montello's home in eastern Long Island to count the loot. Denisch, who assisted in the counting, testified "it worked out to about fourteen thousand a piece." Tr. 1628. He expected to leave with his share and

Condon's — a total of $28,000 — but "Sonny said it was not a good idea to carry that much money . . . [b]ecause you work for the Company [Holmes] and if you get stopped how could you explain that much money on you, that I should leave the money with Lou and Lou would give it to Bollella . . . and he would give it to me and Dennis if we needed it or the next day." Tr. 1629-30.[4]

Denisch further testified that after work on Monday night he met Condon and Bollella at Ratigan's Bar in Brooklyn, where Bollella remarked, "I heard about last night's work," and said, "Good job, well done." Tr. 1632-33. According to Denisch, in response to the query, "How are you going to work this money?", Bollella said "I will give it to you as you need it. If you want it now, tell me." Denisch testified that Bollella took a little book out and said he was going to keep a record there of the money he gave them. Tr. 1633. Thereafter, Denisch testified, starting a week after the burglary he received a total of about $8,000 from Bollella in ten payments, the last occurring around the beginning of February [1972]. At that time Bollella said there was no more. Tr. 1663-64, 1665-66.

Condon also testified to receiving from Bollella

a part of his share of the bank loot before Condon left for England around January 1, 1972, where he hoped to resume employment as a seaman.[5] Tr. 655-76. Bollella, in his own direct testimony, acknowledged that he and Denisch had driven Condon to the airport and that Condon telephoned him from abroad about January 28 saying he needed money to travel to Spain to get a job on a Spanish freighter. Tr. 2778, 2757. Bollella, characterizing this as another borrowing by Condon, to whom he had previously made many loans, withdrew $300 from his own bank account, obtained a foreign bank draft and sent the money to Condon about February 9, 1972. Tr. 2758-63. He also accompanied it with the following note (Govt. Exh. 3):

> "Dear Fucko, knock off the rented cars and high living. This is it from this end, so make it last. Just don't hurry back." Tr. 2769-70.

Bollella unqualifiedly denied knowledge of the burglary activities of Condon and Denisch or that he acted as a conduit for the Montellos as above described. Despite a strong charge on the untrustworthiness of accomplice testimony and the self-preservation motivations of Condon and Denisch, the jury obviously preferred to believe that Bollella had knowingly played a role in connection with

the bank burglary even though acquitting him of the conspiracy charge. In evaluating the credibility of Bollella's denials and his version of the final money transaction with Condon, the jury had ample evidence from Bollella himself as to his associations with Condon and Denisch on the one hand and his social and business relationships with the Montellos on the other to judge of the probabilities beyond a reasonable doubt.[6]

Bollella's attack on the jury verdict is largely founded on the premise that his acquittal on the conspiracy count renders the guilty verdict on the substantive count hopelessly inconsistent and bars his conviction upon count four. However, there is nothing inherently inconsistent in the jury's conclusion that the defendant did not conspire to burglarize the bank, but did knowingly thereafter receive or possess a portion of the money obtained from the bank. But even if there were, "[i]t is well settled that even plainly inconsistent jury verdicts, simultaneously rendered are the jury's prerogative." United States v. Zane, ___ F.2d ___, ___ slip op., p. 2500 at 2502 (2 Cir. April 1, 1974).

In Zane the very challenge made here was

exhaustively considered and the authorities reviewed by Judge Mansfield. Particularly apposite here are the court's reasons for declining in that case to overturn the jury's finding of guilt on a substantive count:

> Applying these standards, the inconsistency in the jury's verdicts in the present case is more apparent than real. A careful reading of the indictment and the charge to the jury indicates that the jury could have acquitted the appellants on the conspiracy charge as alleged and consistently have convicted them on the substantive count. The acquittal was not necessarily a finding that there was no conspiracy or joint criminal venture, but only that the government had failed to prove the specific conspiracy alleged in Count One. . . . This finding would not have prevented it from concluding on the basis of the other evidence that the appellants had actually committed the substantive offense. Indeed, the jury was permitted to reject any version of the conspiracy and still find that the appellants as individuals had committed the substantive offense. Slip Op. at 2504-05, n. 6 omitted.

In this case, it should be noted that the defendants who entered the bank and carried away the contents of the night depository vault were all convicted of conspiracy (count 1) as well as the two substantive counts which expressed its objective (counts 2 and 3).

In addition to the inconsistent verdict contention, Bollella urges two additional claimed defects in the evidence. First, he contends there is no proof that he

received or was in possession of burglary proceeds on or about December 14, 1971, the date charged in the fourth count. He apparently mistakenly believes that an absence of direct evidence is an absence of proof.[7] However, circumstantial evidence is also proof; and if there was sufficient circumstantial evidence, as there surely was, the conviction must be upheld.

Second, Bollella maintains that the proof did not establish receipt, concealing and possession of money taken from the bank. It is settled, however, that "[c]harging alternative ways of violating a statute in the conjunctive is permissible, and a conviction under such an indictment will be sustained if the evidence indicates that the statute was violated in any of the ways charged." United States v. Conti, 361 F.2d 153, 158 (2 Cir. 1966), vacated sub nom. Stone v. United States, 390 U.S. 204 (1968).[8]

2. No Variance Between Proof and Indictment

Bollella contends not only was there a "fatal" variance between the allegations of count four and the evidence adduced at trial but also between the prosecutor's opening statement and the evidance. The nature of this variance, according to defendant, involves "the manner,

method and means by which the offense was allegedly committed." He maintains that the indictment and opening statement charged "receipt of funds for personal gain at the time of the burglary" but that the evidence at most established that defendant acted as a "conduit with no gain."[9] The court finds no variance on either ground.

The essential charge in count four of the indictment was that Bollella "wilfully and unlawfully did receive, conceal and have in [his] possession . . . currency" which he knew had been stolen in the bank burglary, n. 2, supra. Government counsel in his opening, according to defendant, informed the jury that under this count Bollella "was charged with sharing in the loot of the Manufacturers Hanover burglary."[10] Bollella contends that on the government's own construction of count four, he was convicted on proof of a "substantially and entirely different, distinct and separate" crime; i.e., "passing off someone else's funds as a conduit."[11]

Defendant's premise that count four must be read as charging receipt, concealment and possession of money from the bank burglary solely for personal gain is untenable. As already noted, there is no requirement that

receipt and concealing and possession be proved; proof of commission of any one of these acts with the requisite knowledge would suffice to support conviction. Evidence that defendant was motivated by personal gain would have been unnecessary for conviction — receipt or possession or concealing "knowing the same to have been taken from a bank" by theft is all that §2113(c) requires. Although it may be arguable that the term "possession" implies some incidents of ownership, the court is of opinion that testimony as to Bollella's custody and control and periodic delivery of large sums of currency to the bank burglars Denisch and Condon beginning right after the burglary, and with knowledge of it, would be proof of "possession" within the meaning of the statute.

Both Denisch and Condon testified, as already noted, to their receipt of substantial payments from Bollella on account of their shares of the bank loot. These were initiated and continued under circumstances clearly evidencing Bollella's knowledge of the source and of his role as agent for the Montellos, if the government witnesses were believed. The jury could have credited Bollella's denial that any such transactions occurred but

chose not to. Thus there was direct evidence of Bollella's actual possession of large sums of money, which he voluntarily paid over to Denisch and Condon.

Even assuming arguendo that Bollella was charged with receipt, concealing and possession of the proceeds for his own account, as the prosecutor stated in his opening to the jury, that he actually did these acts for the benefit of others would not be a material or prejudicial variance. His knowing possession within the meaning of the indictment was fairly inferable beyond a reasonable doubt. No meritorious claim of surprise or prejudice is or could be asserted under the circumstances.

3. Hearsay Properly Admitted

The jury, in the court's opinion, correctly found Bollella not guilty on the conspiracy count.[12] There was no evidence that he played any part in the planning or execution of the bank burglary itself — the specific offense charged in the conspiracy count. On that basis Bollella contends that his conviction on count four resulted from the jury's consideration of hearsay declarations made by Louis and Sonny Montello as related by Denisch. These occurred during the counting and division

12

of the loot as previously recounted at pp. 4-5, supra, at which Bollella was not present.

Bollella argues that this latter testimony was introduced as proof of the conspiracy count, that the court's limiting instructions, n. 4 supra, pertained solely to the conspiracy count, and that it was error to fail to instruct the jury that such testimony could not be considered against him on the substantive count.

Precisely that same contention was considered and rejected by the Court of Appeals in United States v. Zane, supra, where defendants had been acquitted of conspiracy but found guilty on related substantive offenses. There, as here,

> [a]ppellants asked the court to rule that the hearsay evidence admitted on the conspiracy count should not be considered on the substantive count. Their theory is that the jury, having rejected the conspiracy count, should not be free, in their deliberations on the substantive count, to consider evidence admitted because of the conspiracy count. The argument fails in at least two respects. Slip op. at 2506.

The Court went on to state the reasons also applicable here:

> First, the hearsay evidence was admissible from the very outset on both the conspiracy and

> the substantive counts. Once the court is satisfied by a fair preponderance of independent evidence as to the existence of a joint criminal undertaking, ordinary agency principles permit hearsay statements of a colleague in furtherance of that enterprise to be admitted on a substantive count that is unaccompanied by any conspiracy count. [Citations omitted.] This result is not changed by the inclusion of a conspiracy count or by the jury's acquittal on that conspiracy count. [Citations omitted.]
>
> Second, the question of the admissibility of hearsay evidence on the substantive and the conspiracy counts was for the judge alone to decide. That determination of admissibility is not altered because the jury later decides to acquit on either of the counts. Id. at 2506-07.

In this case, at the conclusion of all the evidence the court was satisfied that there was sufficient evidence of the existence of the conspiracy and of Bollella's possible participation, independent of the controverted hearsay statements, to warrant submission to the jury. The jury's finding that there was a conspiracy was upheld as to the other defendants. United States v. Fasanella, supra. Under the court's instructions, it was left to the jury to determine the duration of the conspiracy and whether Bollella was or became a member while it existed. In acquitting him on the conspiracy count the jury quite evidently found he had not participated in the plan to burglarize the bank.

But that did not bar the jury from considering such evidence as there was before it which tended to prove that Bollella had received and possessed — even as a conduit — money he knew was part of the loot taken from the bank as charged in count four. That evidence included not only the controverted hearsay declarations of co-conspirator Sonny Montello but also testimony of co-conspirators Condon and Denisch as to their direct dealings with Bollella and statements made by him regarding their shares of the bank loot. To that extent he became their partner in a criminal joint venture and would have been such whether or not a conspiracy had been alleged. United States v. Alsondo, 486 F.2d 1339 (2 Cir. 1973).[13] Thus, it is clear that (1) the testimony to which Bollella objects was properly admitted subject to connection; (2) the court's instructions were not limited to the conspiracy count; (3) no such limiting instructions were required since once the case was submitted to the jury, all probative evidence could have been considered on the substantive count; and (4) the testimony only reiterated prior testimony not objected to, such as a statement attributed to Louis Montello.[14]

4. Prior Inconsistent Statement Properly Received

A major thrust of Bollella's defense in his direct testimony was the assertion that he, like Denisch and Condon, had been offered a deal to testify for the government, but that, unlike them, he was unwilling to lie and falsely implicate others. Tr. 2816-17, 2841-42. In considerable detail he described various post-arrest efforts on the part of law enforcement agents to get him over to the government's side. One of these efforts was a meeting with fellow New York City police officers Rooney and Rossa who were working with the federal prosecutor on the case. There is no question that the meeting took place on September 6, 1972, at the Burger Flame Restaurant in Brooklyn and that Bollella's counsel was not present.[15]

The government called Officer Rooney as a rebuttal witness for the purpose of impeaching Bollella's direct testimony regarding the conversation at the Burger Flame meeting. Rooney gave a sharply contrasting version of the surrounding circumstances. He testified he approached Bollella on a "cop to cop" basis, explaining he was a field detective working on crime and "not out to trap other cops." In offering Bollella "an opportunity to

testify for the Government in this case", he told Bollella he "would speak to the Federal Attorney and try to do the best I could for him." Bollella responded with the query, "Well, what can you do for me about the job?" Rooney told him he would bring his cooperation to the attention of his superior officers. Tr. 3019.

At the end of the foregoing conversation there occurred what Bollella contends was an improperly obtained admission or confession in the absence of his counsel. Rooney testified that their meeting ended with Bollella exlaiming "I can't do it, I can't do it." Id. Bollella had characterized this as an expression of his unwillingness to lie against others to save himself. Tr. 2841-42. Rooney testified, however, that the reason Bollella gave for his unwillingness to cooperate was "I'd rather be alive in jail than dead on the street", and had at no time said he could not testify to something that would be a lie. Tr. 3019-20.

First, it is doubtful whether the statement in question was obtained in violation of defendant's rights under Massiah v. United States, 377 U.S. 201 (1964).

Second, admission of Officer Rooney's testimony, which occurred only after lengthy argument and consideration, was permissible since the testimony was introduced as part of the government's rebuttal case, in an effort to impeach the credibility of Bollella's direct testimony, by revealing prior inconsistent conduct and statements. Tr. 2981-3012. Bollella having chosen to open up the subject in his own testimony, there could have been no justification for allowing his counsel to make maximum use of the alleged Massiah violation in comments to the jury, thereby possibly allowing Bollella to "affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." Walder v. United States, 347 U.S. 62, 65 (1954). Consequently, Officer Rooney's testimony was properly admitted into evidence to rebut the specific portions of Bollella's testimony concerning his alleged reasons for declining to assist the prosecution of the case. Tr. 2993-94. Harris v. New York, 401 U.S. 222 (1971). See Comment, The Impeachment Exception to the Constitutional Exclusionary Rules, 73 Colum. L. Rev. 1476 (1973).

Moreover, the court, following Rooney's testimony, instructed the jury that the alleged statement was

not to be considered as evidence against Bollella or any of the defendants, and it was being admitted solely on the issue of Bollella's credibility, his reasons or state of mind when he spoke with the police officers. Tr. 3029-30.[16] Compare United States v. Gaynor, 472 F.2d 899 (2 Cir. 1973).[17]

5. Subsequent Similar Act Properly Admitted

Bollella challenges the admissibility of testimony by Denisch that Bollella received $5,000 from the proceeds of a subsequent, unrelated bank burglary of a Chase Manhattan Bank branch on April 28, 1972. Tr. 2433-37. He contends that "[t]he prejudice to Bollella far outweighs the probative value, if any, of such testimony and appropriate objections and motions were made; but in any event a case of clear error exists."[18]

Bollella's counsel questioned Denisch concerning the latters' arrest on July 11, 1972, and focused on $32,000 found in his home that day. Denisch admitted that this money was his share of a burglary from the Chase Manhattan Bank. Tr. 1942-43. Using Denisch's testimony from an earlier trial (that he might have received $52,000 from that burglary) Bollella's counsel sought to

impeach this statement, and directly, as well as indirectly, Denisch's testimony concerning distribution of the proceeds from the Manufacturer's Hanover burglary. Tr. 1943-47, 1949-56.

Counsel for other defendants also were permitted to explore Denisch's acquisition and disposition of this wealth on their contention that it bore upon his motives for implicating these defendants rather than his companions in the Chase Manhattan burglary. Tr. 1967-68, 2042-45. Thus he was asked (Tr. 2051):

> "Q: Out of the moneys you received out of the Chase Manhattan job in April, you gave $5,000 away, didn't you?
>
> "A: I did.
>
> "Q: Didn't you give it to Dennis Condon?
>
> "A: No."

The government on redirect, attempting to rebut the defense contention that Denisch was falsely implicating them to shield others, asked Denisch to whom he had given the $5,000. Denisch replied, "Bollella." Tr. 2433. Bollella's counsel then pursued the matter on recross. Tr. 2456-59.

Not until after the conclusion of Denisch's testimony and after the government had rested its case, did counsel clearly object to the testimony on the ground that it was proof of another crime. Tr. 2485-86. The court declined to instruct the jury to disregard the evidence, pointing out that defense counsel had extensively examined Denisch on the subject, and the testimony was probative of Bollella's state of mind, intent and association with Denisch. Tr. 2486.

The rule is settled in this Circuit "that evidence of similar crimes is admissible when it is substantially relevant for a purpose other than merely to show defendant's criminal character or disposition." United States v. Deaton, 381 F.2d 114, 117 (2 Cir. 1967).[19] Accord United States v. Brettholz, 485 F.2d 483, 487 (2 Cir. 1973); United States v. Vario, 484 F.2d 1052, 1056 (2 Cir. 1973), cert. denied, ___ U.S. ___ (1974); United States v. Carella, 411 F.2d 729, 731 (2 Cir.), cert. denied sub nom. Erhart v. United States, 396 U.S. 860 (1969).[20] In allowing such evidence the trial court must, of course, balance all relevant factors to determine whether the probative value of the evidence is outweighed by its pre-

judicial character. Id. And the amount of probative value required is lower, where the government seeks to offer such evidence in rebuttal rather than on its case in chief. United States v. Byrd, 352 F.2d 570, 574 (2 Cir. 1965); United States v. Deaton, supra at 118 n. 3. See also United States v. Nathan, 476 F.2d 456, 460 (2 Cir. 1973) (upholding use of post-conspiracy evidence in rebuttal).

There appears to be no sound reason for distinguishing between prior and subsequent similar acts. United States v. Pfingst, 477 F.2d 177, 193-94 (2 Cir.), cert. denied, 412 U.S. 941 (1973).[21] Moreover, as in Pfingst, the questioning here challenged not only related to a major thrust of cross-examination by defense counsel, but clarified answers given in response to specific questions asked by Bollella's counsel. Id. Consequently, the court believes that admission of Denisch's testimony was a proper and justifiable exercise of its discretion.

The motion to set aside the jury's verdict finding defendant Bollella guilty on count four is in all respects denied.

So ordered.

/s/ EDWARD R. NEAHER

U. S. D. J.

Dated: Brooklyn, New York
June 7, 1974

## FOOTNOTES

[1] Two defendants were not tried. Defendant Dennis Condon pled guilty to the conspiracy charged and became one of the Government's two principal witnesses against the other defendants. The remaining defendant, Louis Montello, brother of convicted defendant Salvatore Montello, became too ill to stand trial and was severed.

[2] Count four of the indictment charged as follows:

> "On or about the 14th day of December 1971, in the Eastern District of New York, the defendants
>
> LOUIS MONTELLO and
> ROBERT BOLLELLA
>
> wilfully and unlawfully did receive, conceal, and have in their possession approximately Fourteen Thousand Dollars ($14,000) in United States currency which had been taken and carried away, with intent to steal and purloin, from the Manufacturers Hanover Trust Company, 81-20 Northern Boulevard, Queens, New York, the deposits of which were insured by the Federal Deposit Insurance Corporation, the defendants LOUIS MONTELLO and ROBERT BOLLELLA knowing said money to have been so taken. (Title 18 United States Code §2113(c) and §2)."

[3] Motion to Vacate and Set Aside Judgment of Conviction, September 20, 1973.
Supplemental Memorandum, October 1, 1973.
Supplemental Memorandum, October 17, 1973.
Supplemental Reply Memorandum, October 18, 1973.
Letter to the Court, October 29, 1973.

[4] At the request of Bollella's counsel, the court gave the jury a limiting instruction regarding this testimony. Tr. 1629.

[5] Condon had explained in his testimony that he could not obtain such employment here because the Coast Guard had revoked his papers as the result of a maritime accident

in New York Harbor for which Condon had been held responsible. Tr. 324.

[6] In 1967-1968 Bollella had kept steady company with Louis Montello's daughter, Mary Ann, whose sister Helen was married to Bollella's partner in police work. He met Sonny Montello in 1970 and in that year became an active partner-investor in business with Louis Montello, publishing a racing handicap sheet under the name "Monte Turf." Tr. 2741-43, 2747.

Bollella's acquaintance with Condon began in 1967, the latter later introducing him to a young woman Bollella intends to marry. In 1970 Condon introduced Bollella to Denisch with whom he frequently socialized thereafter. Tr. 2744-45.

[7] See Motion to Vacate and Set Aside Judgment of Conviction, September 20, 1973, pp. 3-6.

[8]

> [W]here legislative definition of a crime sets forth disjunctively a number of acts, the commission of any one of which will be a violation of the statute, the prosecution may in a single count of an indictment or information charge several or all of such acts in the conjunctive and under such charge make proof of any one or more of the acts, proof of one alone, however being sufficient to support a conviction. District of Columbia v. Hunt, 163 F.2d 833, 837-38 (D.C. Cir. 1947).

[9] Supplemental Memorandum, October 1, 1973, p. 2.

[10] Supplemental Memorandum, October 17, 1973, p. 5.

[11] Id.

[12] This is not to say that the court should have dismissed the conspiracy charge as to him. The standard of proof required to submit that charge to the jury is, of course, not the same as that required to convict.

When hearsay statements have been received subject to connection, the trial judge's task becomes one of

determining "when all the evidence is in, whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances." United States v. Geaney, 417 F.2d 1116, 1120 (2 Cir. 1969), cert. denied sub nom. Lynch v. United States, 397 U.S. 1028 (1970). The test of a fair preponderance of the evidence established by Geaney can be satisfied by a lesser amount of proof than is required to justify submission of a conspiracy charge to the jury. United States v. Calabro, 449 F.2d 885, 889-90 (2 Cir. 1971), cert. denied, 405 U.S. 928 (1972).

13 As pointed out in Alsondo, supra at 1346-47:

> It is well established in this and in other circuits that the admissibility of acts of a joint criminal venturer against his partner in crime "rests on basic principles of agency and not on the presence of a conspiracy count." United States v. Granello, 365 F.2d 990, 995 (2d Cir. 1966) (Friendly, J.), cert. denied, 386 U.S. 1019, 87 S. Ct. 1367, 18 L. Ed. 2d 1458 (1967). Similarly, the out-of-court declarations of a co-conspirator are admissible against a defendant although conspiracy is not alleged in the indictment. United States v. Annunziato, 293 F.2d 373, 378-81 (2d Cir.), cert. denied, 368 U.S. 919, 82 S. Ct. 240, 7 L. Ed. 2d 134 (1961); United States v. Pugliese, 153 F.2d 497, 500 (2d Cir. 1945). Cf. United States v. Jacobs, 475 F.2d 270, 281 n. 25 (2d Cir. 1973).

14 Denisch testified that as to certain burnt and wet money the following transpired:

> "We put that on one side along with the money that was wet and we put all the ones to one side. And Lou [Montello] said, 'Don't worry, me and Bollella will share that.'" Tr. 1627.

Bollella did not object to this statement.

15 Bollella's testimony concerning his post-indictment conversations with government agents was clearly elicited with knowledge that the government would attempt to rebut such testimony. See, e.g., Tr. 124-25, 2801-11.

Bollella's Massiah claims were raised and dealt with at an evidentiary hearing immediately preceding the trial. The court determined that the meetings had produced no evidence sought to be used by the prosecution other than possibly incriminating conduct or admissions. Tr. 120-21. As to these, the government had indicated at the outset that it had no intention of introducing any testimony concerning the post-indictment meetings on its direct case, although the agents present at the Burger Flame meeting were available to testify. Tr. 11-13.

16 Despite counsel's objection to this testimony, it would appear from the record that he concurred in the court's limiting instructions. Tr. 2998.

17 Defendants at the close of the case orally requested that the court in its charge again instruct the jury on this point. Tr. 3135-36. Upon reflection, the court believes that it would have been better practice to have granted the application. However, in view of the circumstances surrounding the testimony, the instruction given at the time it was received in evidence, as well as the timing and manner of the request to charge, the court concludes that the omission does not warrant a new trial. Cf. United States v. Mobley, 462 F.2d 69, 70-71 (2 Cir. 1972).

18 Supplemental Memorandum, October 17, 1973, p. 14.

19 The rule in other circuits is that evidence of other crimes is generally not admissible, but "[b]ecause the exceptions are so numerous, it is difficult to determine whether the doctrine or the acknowledged exceptions are more extensive." Id.

20 Carella upheld the admissibility of testimony by accomplice witness similar to that here in a similar prosecution, conspiracy to rob a federally insured bank.

The testimony was elicited by the trial judge who asked the witness Calabrese whether

> in various conversations with defendant Erhart there was any discussion in Calabrese's presence about any share of the proceeds of the planned robbery. Calabrese said they had discussed it, that "I give him 10% of every score," and that the same percentage had been agreed in this instance. United States v. Camila, supra at 731.

The judge had refused to strike the reference to previous crimes or to grant a mistrial because of it.

21 See also United States v. Chase, 372 F.2d 453, 460-61 (4 Cir.), cert. denied, 387 U.S. 907 (1967);
United States v. Rodriguez, 474 F.2d 587, 589-90 (5 Cir. 1973);
United States v. Goodwin, 470 F.2d 893, 899-900 (5 Cir. 1972), cert. denied, 411 U.S. 969 (1973);
United States v. Harrison, 461 F.2d 1127, 1132 (5 Cir.), cert. denied, 409 U.S. 884 (1972);
United States v. Alston, 460 F.2d 48, 54-55 (5 Cir.), cert. denied, 409 U.S. 871 (1972);
Oden v. United States, 410 F.2d 103, 105-06 (5 Cir. 1969);
United States v. Wells, 431 F.2d 432, 433 (6 Cir.), cert. denied, 400 U.S. 967 (1970).

380 A

**COMPLAINT FOLLOW-UP**

PD 313-081 (Rev. 10-71) 2266
(FORMERLY D.D.5)

* FOR OFFICE USE ONLY
(Do Not Fold This Report)

Additional Copies Required For:

Complaint File No. 70

| Date of this Report | Referred to | 64.* | STATUS OF CASE | 30. C.C.D. No. | 19. Pct. | 22. Complaint No. | Year |
|---|---|---|---|---|---|---|---|
| 9/6/72<br>9/16/72 | | | ☑ Active ☐ Closed ☐ Unfounded | 287961 | 68 | 3421 | 1972 |

**INSTRUCTIONS: Whenever a case is unfounded or a crime classification is changed, ALL shaded captions MUST be completed.**

| 11. Day, Date and Time of Occurrence | 14. * | 15. * | 16. * | 17. * | Classification Changed to | Previous Classification |
|---|---|---|---|---|---|---|
| | | | | | | |

| 27. Post | 36. * | 39. * | 40. ☐ Inside ☐ Outside | * |
|---|---|---|---|---|
| | | | | |

| 41. * | 42. Pct. of Arrest | 45. Arrest Nos. |
|---|---|---|
| | | |

| Copy of this report forwarded to Corr. Unit for Communication | Alarm Number |
|---|---|
| ☐ YES ☐ NO | |

| 50. Type of Property ☐ Lost ☐ Stolen | 51. Value of Property | 57. Value of Property Recovered |
|---|---|---|
| 1. Autos Stolen or Recovered | | |
| 2. ☐ Autos Recovered by Other Auth. 3. ☐ For Other Auth. | | |
| 4. Currency | | |
| 5. Jewelry | | |
| 6. Furs | | |
| 7. Clothing | | |
| 8. Firearms | | |
| 9. Miscellaneous | | |

DETAILS AS REPORTED BY FOLLOW UP INVESTIGATING OFFICER

SUBJECT: INTERVIEW OF ROBERT BOLLELLA.

1. The undersigned with Det. James Rooney #2912 both of the 11th B/L Sqd. interviewed one Robert Bollela a subject of this investigatin

2. This interview was conducted at the Burger Flame restaurant located at Ave. U & Gerritsen Ave. this date at 1130 hrs. No results were obtained from this interview.

**USE REVERSE SIDE IF MORE SPACE IS NEEDED (Carbon must be inverted)**

DESCRIPTION OF LOST OR STOLEN PROPERTY— DO NOT ENTER PROPERTY PREVIOUSLY REPORTED See Appendix G of R. & P. | Property Clerk Voucher No.

| ARTICLE (Name Only) | QUANTITY | VALUE | DESCRIPTION (Include Serial Numbers Where Possible) |
|---|---|---|---|
| | | | |

DESCRIPTIONS OF PERSONS WANTED, PERSONS ARRESTED AND ARREST DISPOSITIONS-See Appendix G of R. & P.

| Investigating Officer's Name (Typed) | Investigating Officer's Signature | Commanding Officer's Signature |
|---|---|---|
| Rank Det. Shield No. 1105 Command 11th B/L<br>Samuel Rosa | Samuel Rosa | Richard Conroy |

IN BEHALF OF ROBERT BOLLELLA

EVEN IF YOU BELIEVE DENISCH'S STATEMENT THAT HE ALLEGEDLY GAVE $5,000.- OF THE PROCEEDS OF THE SUBSEQUENT CHASE MANHATTAN BURGLARY TO ROBERT BOLLELLA IN APRIL OF THE FOLLOWING YEAR, SUCH FACT, IF IT BE THE FACT, CAN NOT BE CONSIDERED AS ANY PROOF AT ALL THAT MR. BOLLELLA EVER CONSPIRED TO BURGLARIZE THE MANUFACTURERS HANOVER BANK OR EVEN HAD RECEIVED ANY OF THE LOOT FROM SUCH MANUFACTURERS HANOVER BURGLARY.

FURTHER REQUEST TO CHARGE
IN BEHALF OF ROBERT BOLLELLA

THE GOVERNMENT IS UNDER A DUTY NOT TO INTERROGATE A DEFENDANT IN A CASE IN THE ABSENCE OF HIS ATTORNEY, UNLESS HE KNOWINGLY AND VOLUNTARILY WAIVES HIS RIGHT TO COUNSEL.

IF MR. BOLLELLA DISCLOSED HIS DEFENSE TO MR CONDON, WHO WAS THEN ACTING AS A GOVERNMENT AGENT, YOU MUST ACQUIT.

IF YOU FIND THAT, MR BOLLELLA ATTENDED SUCH MEETING WHILE under phsychological coercion due to the telephone calls received by him, YOU CANNOT find that he voluntarily AND KNOWINGLY waived the presence of his counsel.

JUDGMENT AND COMMITMENT (Rev. 2-68) Cr. Form No. 23

FILED
IN CLERK'S OFFICE
DISTRICT COURT E.D. N.Y.
JUN 28 1974
TIME A.M.
P.M.

383A

# United States District Court

FOR THE

EASTERN DISTRICT OF NEW YORK

*United States of America*

v.

ROBERT BOLLELLA

*No.* 72 CR 951

M'FILMED

On this 28th day of June 19 74 came the attorney for the government and the defendant appeared in person and with counsel

IT IS ADJUDGED that the defendant upon his ~~plea of~~ a verdict of guilty

has been convicted of the offense violating T-18, U.S.Code, Secs. 2113(c) & 2 in that on or about Dec. 14, 1971, the defendant, with another, did wilfully and unlawfully receive , conceal and have in their possession approximately $14,000 in U.S. currency, which had been taken and carried away, from the Mfrs. Hanover Trust Co., Queens, N.Y., the deposits of which were insured by the Federal Deposit Insurance Corp. the defendants, knowing the same to have been so taken

as charged in count 4

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 3 years on count 4 pursuant to T-18, U.S.C. Sec. 4208(a)(2). Execution of sentence stayed pending appeal

IT IS ADJUDGED that

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Edward R. Neaher

*United States District Judge.*

The Court recommends commitment to

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U. S. DISTRICT COURT E.D. N.Y.
JUN 28 1974
TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

UNITED STATES OF AMERICA

- vs -

ROBERT BOLLELLA

---

NOTICE OF APPEAL

File No: 72 CR 951

Notice is hereby given that the defendant ROBERT BOLLELLA hereby appeals in forma pauperis to the United States Court of Appeals for the Second Circuit from the final Judgment entered in this proceeding on the 28th day of June 1974

Dated: Brooklyn, New York
June 28, 1974

By Direction of the Court

LEWIS ORGEL, CLERK
U.S. District Court
Eastern District of New York
on behalf of the defendant

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